Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CREDICORP, INC., THE ESTATE OF JOHN RHEINFRANK, AND STEVAN W. BROWN, INDIVIDUALLY, AND AS VICE PRESIDENT OF CREDICORP, INC.,

Petitioners,

V.

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Florida statute violates the Commerce Clause by requiring out-of-state residents that engage solely in direct-mail or Internet marketing *with absolutely no other nexus to the state* to pay a licensing fee, appoint an in-state agent, and meet other licensing requirements before they make installment sales to Florida residents.

RULE 29.6 STATEMENT

Petitioner Credicorp, Inc. has no parent corporation and no nonwholly owned subsidiaries. Petitioner Stevan Brown is an individual. Petitioner John Rheinfrank was an individual who died while the proceedings below were pending.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Credicorp, Inc. ("Credicorp"), the Estate of John Rheinfrank, and Stevan W. Brown (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the final judgment of the Supreme Court of Florida in this case. The Supreme Court of Florida upheld as constitutionally permissible under the Commerce Clause the State of Florida's statutory licensing and regulatory scheme concerning retail installment sellers. In so doing, the Supreme Court of Florida reversed the lower court's holding that the Florida Retail Installment Sales Act, as applied to a Texas-based direct-mail marketer with no nexus to the State of Florida, violated the Commerce Clause. Accordingly, all out-of-state marketers that want to sell to Florida consumers on an installment basis through the mail or Internet are now required to pay a licensing fee, register, and satisfy other licensing requirements or face fines and other penalties. Further, if the seller decides not to register, it must refrain from engaging in certain advantageous business practices permitted to licensed sellers. The Petitioners respectfully ask that the Court—possibly by *per curiam* opinion—remand this case with instructions to the Supreme Court of Florida that the intermediate Florida appellate court properly concluded that the Retail Installment Sales Act, as applied to out-of-state marketers with no nexus to Florida, violates the Commerce Clause. [1]

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App. 1a) is reported at 684 So.2d 746 (Fla. 1996). The opinion of the District

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[1] This is a final judgment because the Florida Supreme Court held that its answer to the first of two certified questions resolved the case. If the intermediate court's ruling on the first question is reinstated by this Court, remand is proper; the Florida Supreme Court may address the second certified question, which concerns the Loan Broker Act. This Court, however, may also reverse and rule that the Loan Broker Act also violates the Commerce Clause.

Court of Appeal of Florida, First District (App. 1b) is reported at 659 So.2d 376 (Fla. Dist. Ct. App. 1995). The Final Order is attached (App. 1c) and is unreported.

JURISDICTION

The Supreme Court of Florida issued its decision on October 31, 1996. App. 1a. Credicorp filed a timely motion for rehearing on November 11, 1996, which the Supreme Court of Florida denied on December 17, 1996. App. 1e. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article I, § 8, cl. 3, of the United States Constitution ("the Commerce Clause") empowers Congress to "regulate Commerce with foreign Nations, and among the several States. . . ."

The appendix (App. 1d) sets forth verbatim the following Florida statutory provisions: (1) Retail Installment Sales Act, Fla. Stat. Ann. § 520.32 (West Supp. 1997), and (2) The Loan Broker Act, Fla. Stat. Ann. §§ 687.14, 687.141 (West Supp. 1997).

STATEMENT OF CASE

Despite a contrary ruling by the Florida Court of Appeal under the Commerce Clause, the Supreme Court of Florida ruled that the State of Florida ("Florida") may require out-of-state retail installment sellers—with no substantial nexus to Florida—to pay a licensing fee, register, and meet other licensing requirements to sell to Florida residents. If these requirements are not met, an out-of-state marketer, as Credicorp was, may be fined $1,000.00 per violation. Moreover, if a seller does not

become licensed, it cannot engage in certain advantageous business practices permitted to licensed sellers. This petition asks this Court to review a question of profound significance to all sellers that exclusively market their products through the mail or Internet: Whether states, consistent with the Commerce Clause, may require out-of-state retail installment sellers, with no substantial nexus to the state, to become licensed in that state, appoint an agent for service of process, and meet other requirements to sell to their residents.

This petition should be granted for at least two significant and independent reasons. *First*, this case presents an important unsettled federal question concerning the Commerce Clause that has not been, but should be, decided by this Court. Specifically, the open question is whether states may constitutionally require direct-mail marketers that sell their products on an installment basis—with no nexus to the state—to become licensed, pay a fee, designate an agent, and meet other licensing requirements before they may sell their products to the residents of a particular state. Currently, this Court has not articulated a standard to be applied to this type of case. This case presents a clear set of facts that makes the Petitioners' case an appropriate vehicle to have this issue decided. This type of case and statutory scheme have not been considered by this Court, but should be, because of the growth of this significant industry and the potential detrimental impact of Florida's decision on interstate commerce. Indeed, if similar statutes are enacted by all fifty states, a direct-mail marketer that sells on an installment basis could be faced with complying with an onerous different set of complex statutes and paying fees in each state.

Second, the Supreme Court of Florida's decision conflicts with relevant decisions of this Court that prevent states from placing restrictions and undue burdens on interstate commerce

and particularly upon direct-mail marketers that have no substantial nexus to the state. Indeed, the Commerce Clause principles articulated by this Court in taxation and registration cases compel the granting of this petition.

A. THE PETITIONERS.

1. Petitioner Credicorp Is a Texas Company That Operates in Florida Only Through the Mail.

Credicorp is an exclusively Texas-based, direct-mail marketer operating a nationwide, membership-only catalog business. It is one of the thousands of direct-mail marketers operating in the United States today. Credicorp solicits potential members solely through the United States mail. Potential customers are invited to become Credicorp members by paying a $29.95 annual fee. Credicorp's services include, among other things, making merchandise available for purchase on a retail installment basis from Credicorp's catalog. Upon receipt of the membership fee, Credicorp sends new members a catalog of available merchandise, discount coupons, and other offers. Credicorp members may buy merchandise from the catalog and pay for such merchandise on an installment basis. Credicorp members also receive benefits such as hotel and car rental discounts. Approximately 1,600,000 individuals nationwide, including approximately 600 Florida residents, have been enrolled as Credicorp members. [2] *See* App. 7a-8a,7b.

While Credicorp sells its products and services nationwide, it is a Texas corporation with its only place of business in Dallas, Texas. Credicorp has no offices, stores, outlets, employees, agents, or independent contractors in Florida. It does not own any property in Florida. Credicorp does not collect any Florida sales or use taxes. It does not have a telephone listing in Florida.

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[2] Moreover, Credicorp has received over a thousand merchandise orders from Florida residents. *See* App. 7b.

Indeed, the only contact Credicorp has with Florida residents is through the United States mail or common carrier. [3] As a result, Credicorp has never registered to do business in Florida. *See* App. 3a.

2. The Individual Petitioners Reside in Texas With No Ties to Florida.

Stevan Brown, a resident of Texas, is the former president of Credicorp. He has also served as the Secretary, Vice President, and Treasurer of Credicorp. *See* App. 8a.

John Rheinfrank, was the president of Credicorp from November of 1990 until October of 1992. He passed away on October 25, 1993. *See* App. 8a. He also resided in Texas. There is no evidence in the record that either Mr. Brown or Mr. Rheinfrank had any personal contacts with Florida.

B. FLORIDA'S LICENSING SCHEME UNDER THE RETAIL INSTALLMENT SALES ACT.

Florida has created a licensing statutory scheme targeting retail installment sellers. The pertinent statute is the Florida Retail Installment Sales Act ("the Sales Act"). The Sales Act was the basis for the Supreme Court of Florida's reversal against the Petitioners.

Under the Sales Act, "[a] person may not engage in or transact the business of a retail seller engaging in retail installment transactions as defined in this part or operate a branch of such business without a license . . . ." Fla. Stat. Ann. § 520.32(1) (West Supp. 1997). A retail installment seller is assessed a two hundred dollar ($200) fee for obtaining the license and must renew the license every two (2) years, paying

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[3] Of paramount significance, throughout the lower court proceedings, the parties agreed that Credicorp's only contact with Florida is through the United States mail or common carrier. *See* App. 2a-3a.

another $200 fee. *Id.* §§ 520.32(2), (3). A licensed retail installment seller is also required to designate and maintain an agent for service of process in Florida. *Id.* § 520.32(6). [4]Finally, the Sales Act requires sellers to conspicuously display the license at the location specified in the license. *Id.* § 520.32(4).

As noted by the Supreme Court of Florida, the licensing requirements of the Sales Act were clearly intended to reach mail order sales. App. 15a. Indeed, the Sales Act expressly governs retail installment contracts "negotiated and entered into by mail or telephone without personal solicitation . . . . . when a catalog of the seller . . . is distributed and made available generally to the public. . . . " *Id.* § 520.36. Moreover, the Sales Act requires persons within and outside of Florida who wish to enter into retail installment sales to comply with its regulations. *Id.* § 520.34.

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[4] The Florida Loan Broker Act, which was not addressed by the Supreme Court of Florida, but was addressed by the lower courts, also imposes restrictions on non-licensed retail installment sellers. For example, under this statute, no loan broker (the statute's definitions encompass retail installment sellers) is allowed to "[a]ssess or collect an advance fee from a borrower to provide services as a loan broker." Fla. Stat. Ann. § 687.141(1) (West Supp. 1997). This Act, however, defines a "loan broker" to exclude any retail installment sales company that is "licensed by and subject to regulation or supervision of any agency of the United States *or this state.*" *Id.* § 687.14(4) (emphasis added). Retail installment sellers that register and pay the licensing fee under the Sales Act are therefore exempt from the Loan Broker Act by definition, while sellers that have not become licensed and paid this tax are subject to regulation under the Act. *See id.* As a result, businesses licensed under the Sales Act may collect advance fees from customers without being subject to the constraints of the Loan Broker Act. Since Credicorp is not licensed under Florida law, Florida argued that Credicorp could not collect its membership fees without violating the Loan Broker Act. App. 8b.

C. THE UNDERLYING LITIGATION.

1. The Administrative Action and Hearing.

On January 13, 1993, the Florida Department of Banking and Finance (the "Department") filed an administrative complaint alleging, in pertinent part, that Credicorp was an unlicensed retail installment seller in violation of Section 520.32(1) of the Sales Act. [5] The Petitioners timely filed a response and requested a formal hearing. They argued that Credicorp could not be constitutionally required to pay the licensing fee and meet the other requirements set forth in the Sales Act. The Petitioners also argued, *inter alia*, that Credicorp did not mislead or deceive any of its members. *See* App. 11c.

Following a one-day hearing at which no Credicorp customers or recipients of mailings testified, [6] the Hearing Officer recommended a $378,000 fine for Credicorp's failure to register as a retail installment seller and to pay the $200.00 licensing fee set forth in the Sales Act. [7] The Petitioners filed objections to the Hearing Officer's recommendations. In the Final Order, entered on January 14, 1994, the Department adopted the Hearing Officer's recommended order, but rejected the Hearing Officer's finding that Credicorp's solicitations operated as a fraud or

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[5] The Department also alleged that Petitioners violated the advance fee collection and misleading representation provisions of Section 687.141 of the Loan Broker Act. The Petitioners argued that Credicorp was not a "loan broker" within the meaning of the Loan Broker Act and that they did not enter into contracts within the State of Florida. *See* App. 10c.

[6] Notably, the Department's lead investigator was the only witness called by Florida. During the hearing, she conceded that she knew of no facts to establish that Credicorp lends money or advances funds to its members. *See* App. 8b-9b.

[7] This fine was calculated by multiplying 378, the number of form orders for merchandise received from Florida residents, by $1,000.00, the maximum administrative fine that may be levied per violation under the Sales Act. *See* Fla. Stat. Ann. §§ 520.39, 520.995(2)(f).

deception upon Florida residents. [8] In reaching its decision, the Department recognized that Credicorp's only contact with Florida was through the United States mail or common carrier. *See* App. 21c-22c. [9]

2. The Florida Court of Appeal Found the Sales Act Unconstitutional.

a. *The Majority Opinion.*

The Petitioners timely appealed to the District Court of Appeal for the First District ("Court of Appeal"). Once again, the Petitioners argued that, under the Commerce Clause, Credicorp could not be required to pay the licensing fee, register, and meet the other requirements of the Sales Act.[10] Finally, the Petitioners argued that the penalty imposed by the Hearing Officer was unduly harsh. *See* App. 2b-4b.

On review, all three judges on the appellate court agreed with the Petitioners and held that the licensing fee requirement

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[8] Further, a Hearing Officer of the Division of Administrative Hearings agreed with the Department's complaint and recommended that Credicorp cease and desist all activities in violation of the Loan Broker Act and pay a $3,200,000 administrative fine for past violations. This fine was calculated by multiplying 640, the number of Florida residents listed on a batch edit sheet who had returned membership materials to Credicorp, by $5,000, the maximum administrative fine for each violation of the Loan Broker Act. *See* Fla. Stat. Ann. § 687.143(3) (West Supp. 1997). Brown and Rheinfrank were each assessed an additional $250,000 fine. Florida argued that principals of a loan broker may be sanctioned for the actions of the loan broker under Section 687.142 of the Act. *See id.* § 687.142. As such, the recommended fine totalled $4,078,000.

[9] At the hearing, Credicorp vigorously denied that it had engaged in any fraud or deception. *See* App. 11c.

[10] The Petitioners also argued, *inter alia,* that Credicorp was not a loan broker within the meaning of the Loan Broker Act and that the Act did not cover retail installment contracts not entered into in Florida. The majority rejected both arguments. The concurring judge, however, noted that the Loan Broker Act, as applied to the Petitioners, also violates the Commerce Clause. *See* App. 28b-32b.

of the Sales Act was a flat fee license tax that was invalid under the Commerce Clause—as applied to a seller that actively solicited and sold to Florida residents only through common carrier or the mail, but with no physical presence in Florida. In essence, the Court of Appeal recognized that the Petitioners had no nexus to Florida and that a nexus is required before an out-of-state seller could be required to become licensed. As such, the Court concluded that Credicorp could not be constitutionally required to meet the requirements of the Sales Act and set aside the fine. App. 16b-17b.[11]

In reaching its decision, the Court of Appeal stated that "the Florida Legislature envisioned the licensing of retail installment sellers such as Credicorp" and noted that the express legislative intent was "to include within the licensing provisions retail installment contracts negotiated and entered into by mail or telephone." It found significant this Court's decisions in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753 (1967), and concluded that it was bound by this precedent in holding that the Sales Act violated the Commerce Clause.[12] Specifically, the Court of Appeal stated: "We are . . . constrained to find that the

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[11] Despite holding that the licensing tax requirements of the Sales Act were impermissible under the Commerce Clause, the two-judge majority of the Court of Appeal affirmed the Department's application of the Loan Broker Act to Credicorp. The appellate court described the application of the Act as "a permissible exercise of Florida's police power." Even though the Loan Broker Act *excludes* licensed Florida retail installment sellers and thus allows them the competitive advantage of collecting advance fees, the appellate court stated that "[i]nterstate concerns such as Credicorp that decide to pursue business in Florida have the choice of either voluntarily submitting to licensure [under the Retail Installment Sales Act], and thereby falling within the statutory exception [of the Loan Broker Act], or complying with Florida's regulation that prohibits certain loan brokering acts." App. 20b.

[12] The Court of Appeal also relied on Florida cases that have prohibited the imposition of a license tax. *See* App. 10b.

licensing provision, with its flat tax rate, falls within controlling precedent and is therefore unconstitutional." App. 16b.

Because of the public importance of the issue, the Court of Appeal certified the following question to the Supreme Court of Florida:

> May Florida impose a licensing requirement and annual fee upon a retail installment seller that actively solicits and sells to Florida residents, but reaches this state only by United States mail and common carrier?

App. 17b.[13]

b. The Concurring Judge Also Found the Florida Loan Broker Act Unconstitutional.

Notably, Judge Allen concurred with the majority's holding as to the Sales Act, but also concluded that the Loan Broker Act could not be applied without violating the Commerce Clause. Specifically, Judge Allen noted that the Loan Broker Act resulted in harmful discrimination because it treated out-of-state retail installment sellers, like Credicorp, differently from in-state sellers. He also stated that out-of-state retail installment sellers are subject to the Loan Broker Act, but in-state, licensed retail installment sellers are exempt. According to Judge Allen, this forces out-of-state businesses to choose between paying an unconstitutional tax or refraining from business practices permitted to local retail installment sellers. Judge Allen held that

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[13] On motion for certification, the Court of Appeal also certified this issue to the Supreme Court of Florida: "May Florida constitutionally apply the Loan Broker Act, section 687.14—687.148, Florida Statutes, to an out-of-state retail installment seller which, under the Commerce Clause, may not be compelled to be licensed in Florida as a retail installment sales company under section 520.32, Florida Statutes?" App. 2a.

the Loan Broker Act had the practical effect of discriminating against interstate commerce. As a result, he concluded that the Loan Broker Act should not be applied to out-of-state retail installment sellers. *See* App. 30b-32b.

3. The Supreme Court of Florida Erroneously Reversed the Court of Appeal Findings of Unconstitutionality.

The Petitioners and the Department filed timely appeals to the Supreme Court of Florida. On appeal, the Petitioners argued that the Sales Act violated the Commerce Clause when applied to direct-mail marketers with no nexus to Florida. Specifically, as determined by the Court of Appeal, they argued that Credicorp could not constitutionally be required to become licensed under the Sales Act and pay a license fee as well as meet the other requirements set forth in the Sales Act.

Addressing only the first certified question on the constitutionality of the Sales Act's licensing fee, registration, and other requirements, the Supreme Court of Florida held that the Act did not violate the Commerce Clause. While recognizing this Court's well-settled Commerce Clause analysis of state taxes that discriminate against interstate commerce, the Supreme Court of Florida reclassified the licensing fee and other requirements of the Sales Act as a "regulation," thereby evading the substantial nexus requirement and more stringent scrutiny required if the license fee was analyzed as a tax. [14] The Supreme Court of

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[14] *See Quill Corp. v. North Dakota,* 504 U.S. 298, 317-18 (1992) (holding that the Commerce Clause prohibits states from imposing a use tax upon nonresident businesses that solicit from the state's residents, but maintain no physical presence within the state except through mail or interstate carrier); *Complete Auto. Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977) (describing the substantial nexus requirement); *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753, 758 (1967) ("But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers . . . [of] the State is by common carrier or the United States mail.").

Florida concluded that, viewed as a regulation, the licensing fee and other requirements were permissible under the balancing tests used to determine the validity of regulatory measures espoused in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), and *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). Accordingly, it did not apply the substantial nexus requirement set forth in *Quill* and *Bellas Hess.*[15] In addition, the Supreme Court of Florida declined to answer the second certified question concerning the applicability of the Loan Broker Act, thereby retaining Florida's regulatory and licensing scheme, as it was applied to out-of-state direct-mail marketers, intact. App. 26a. [16]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE COMMERCE CLAUSE THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Supreme Court of Florida's decision should be reviewed by this Court because it presents an important federal question that has not been, but should be, settled by this Court concerning the proper standard to be applied to a crucial Commerce Clause issue. Though this Court has settled many aspects of modern Commerce Clause jurisprudence, there is a vacuum

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[15] Moreover, the court largely ignored the other requirements set forth in the Sales Act. The court, for example, did not substantially focus on the registration requirement. *See* App. 15a-17a.

[16] Significantly, the Supreme Court of Florida did not address the overlapping nature of the Loan Broker Act and Sales Act requirements as applied to out-of-state retail installment sellers. As such, it ignored the fact that licensed retail installment sellers are not subject to the Loan Broker Act while out-of-state companies are subject to the regulations set forth in the Act.

into which this case falls. Precisely, whether state licensing statutes—which require out-of-state retail installment sellers to register, pay fees, and meet other licensing requirements—may be constitutionally applied to direct-mail marketers or Internet sites with no nexus to the state. This unanswered federal question has led to confusion among the lower courts as to the proper constitutional standard to be applied to these cases. This case, with its clear "no nexus" set of facts, provides the perfect vehicle for this Court to define the constitutional boundaries of a state licensing and regulatory scheme that unduly burdens interstate commerce. The growth of the direct-mail marketing industry and sales through the Internet make this an especially important issue that merits this Court's attention at this time. [17]

A. Standards Applied by This Court to Traditional Commerce Clause Cases.

As this Court recently emphasized, the Commerce Clause prohibits state taxation or regulation that discriminates or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace. *General Motors Corp. v. Tracy,* ____ U.S. ____, 117 S. Ct. 811, 818 (1997). This Court has applied different standards to various aspects of the Commerce Clause. When state taxation is at issue, for example, the stricter scrutiny of *Complete Auto. Transit, Inc. v. Brady,* 430 U.S. 274 (1977), and its requirement of a substantial nexus to the state is used. By comparison, when pure state regulatory measures are questioned, a two-tiered approach is applied by this Court. Depending upon the overall effect of the statute on local

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[17] The direct mail marketing industry represents a significant portion of interstate commerce. As the North Carolina Supreme Court noted in *Quill,* the mail order business had reached the staggering figure of $183.3 billion in 1989. 504 U.S. at 318. The Direct Marketing Association estimates that more than half of direct marketers now use the Internet and Web. *See Advent of Junk E-Mail Raises Host of Questions,* J. Rec., 1995 WL 6388916, at *2 (July 3, 1995).

and interstate activity, either the *per se* rule of invalidity contained in *Philadelphia v. New Jersey,* 437 U.S. 617 (1978), or the *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), balancing test has been applied by this Court. This Court, however, has not addressed state licensing statutes that impose fees, registration requirements, and other licensing regulations upon out-of-state sellers with no nexus to the state.

Twice before, this Court has recognized the unique position that direct-mail marketers play in maintaining the national marketplace in the context of state taxation. In *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753, 758-60 (1967), for example, this Court held that it was impermissible under the Commerce Clause for the State of Illinois to require an out-of-state mail-order house, with no connection to the state except through common carrier and United States mail, to collect and pay use taxes. Further, in *Quill Corp. v. North Dakota,* 504 U.S. 298, 317-18 (1992), this Court reaffirmed that under the Commerce Clause, an out-of-state mail-order business with no outlets or sales representatives in North Dakota could not be constitutionally compelled to collect and pay use taxes.

Hence, in order to protect the national marketplace, these pure tax cases instruct that direct-mail marketers cannot be constitutionally forced to submit to the taxing authority of a state absent a substantial nexus to that state. *Compare id.* (out-of-state mail-order business with no physical presence in state not subject to use tax) *with National Geographic Soc'y v. California Bd. of Equalization,* 430 U.S. 551, 559 (1977) (out-of-state solicitor that maintained two in-state offices subject to use tax). Critically, whether a substantial nexus is required before a direct-mail marketer can be compelled to pay a license fee, register an agent, and meet other licensing requirements, however, remains an unsettled federal question that merits this Court's attention.

Similarly, the vitality of the substantial nexus requirement for direct-mail marketers in the context of pure regulatory cases impacting interstate commerce is unclear. Under this Court's controlling precedent, state regulations that directly discriminate against interstate commerce or favor in-state interests are struck down without further inquiry. *See, e.g., Philadelphia,* 437 U.S. at 623-24 (describing *per se* rule of invalidity for patently protectionist regulations). When only indirect effects on interstate commerce exist, this Court examines whether the burden on interstate commerce clearly exceeds local benefits. *See, e.g., Pike,* 397 U.S. at 142 (describing flexible balancing test).

The question of physical presence and nexus is further clouded by the "drummer cases." This line of authority has consistently held as constitutionally impermissible under the Commerce Clause license taxes on individuals facilitating the business of out-of-state retail concerns. *See, e.g., Nippert v. City of Richmond,* 327 U.S. 416, 434 (1946) (license tax on solicitors violates Commerce Clause); *Real Silk Hosiery Mills, Inc. v. City of Portland,* 268 U.S. 325, 335 (1925) (license tax and bond requirement impermissible under Commerce Clause). These cases appear to stand as an absolute bar to the application of license taxes and other licensing requirements to Credicorp and other out-of-state direct-mail marketers. This authority, however, predates this Court's modern Commerce Clause approach for both taxation and regulation. Because this authority has neither been reaffirmed nor repudiated by this Court, it adds additional confusion to an unsettled area of Commerce Clause jurisprudence.

B. Confusion Among the Courts Concerning the Treatment of License Tax and Regulatory Statutes.

In the absence of a clear direction from this Court, courts have struggled with the issue of treatment of license taxes, leading to the incorrect application of Commerce Clause doctrine.[18] This case is an excellent example. Confused over which standard to use when assessing the constitutionality of the licensing and tax provisions, the Court of Appeal applied the taxation rubric and determined that the Sales Act was unconstitutional. *See* App. 16b. By contrast, the Supreme Court of Florida eschewed this Court's direct-mail marketing authority in favor of general regulatory precedent. *See* App. 17a-18a. The result was the inappropriate application of general regulatory authority to a direct-mail marketer with no nexus to the state.

This confusion is not isolated. Stretching to find some authority on which to analyze license tax and regulation situations, other states have also turned to the narrow line of authority this Court has established concerning user fees. Developed purely in the context of small fees earmarked for specific public works such as airport maintenance, this Court has found that such fees are constitutionally permissible under the Commerce Clause. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-22 (1972). Struggling to discover an analytical tool to resolve the license fee issue, courts have

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[18] For example, some courts, uncertain as to the proper framework for analyzing such provisions, have turned to the general regulatory precedent posited by this Court. *See, e.g., Ferndale Lab., Inc. v. Cavendish*, 79 F.3d 488, 494-96 (6th Cir. 1996) (Ohio statute requiring drug companies to register and pay fee analyzed using *Pike* balancing test); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 750-53 (7th Cir.) (Wisconsin's fee imposed on out-of-state mail order business analyzed as a regulation), *cert. denied*, 434 U.S. 880 (1977); *California v. Fairfax Family Fund, Inc.*, 47 Cal. Rptr. 812, 813-15 (Cal. Dist. Ct. App.) (California requirement that out-of-state small loan business be licensed analyzed as regulatory measure), *appeal dismissed*, 382 U.S. 1 (1965).

inappropriately seized upon this authority to justify license taxes on out-of-state businesses. *See, e.g., Center for Auto. Safety, Inc. v. Athey,* 37 F.3d 139, 143 (4th Cir. 1994) (classifying Maryland's charitable solicitation tax as constitutionally permissible user fee under *Evansville*), *cert. denied,* 115 S.Ct. 1401 (1995).

What remains is a divergent approach to Commerce Clause treatment of state licensing requirements, taxes, and regulations imposed upon out-of-state businesses that lack a physical presence in the state. The lower court decisions, such as those from the Florida courts in this case, reflect a "pick and choose" approach to find some facet of Commerce Clause jurisprudence to resolve such issues. In the absence of clear guidance from this Court, other states will certainly copy Florida's statutory and licensing structure, with its accompanying regulations and licensing fees, subjecting direct-mail marketers with no nexus to a state to the undue burden of complying with complicated licensing requirements in all fifty states.[19] This type of legislation would have a significant impact on interstate commerce and specifically on the direct-mail marketing industry. As this Court has previously recognized, "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle . . . [a mail order house] in a virtual welter of complicated obligations . . . ." *Bellas Hess,* 386 U.S. at 759-60. In light of the potential detrimental impact on a significant industry and of the growth of sales through the Internet, this petition should be granted and the unsettled federal question resolved.

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[19] Indeed, as in this case, a direct mail marketer could be forced to, *inter alia,* annually determine the current licensing fee for each state, appoint an agent for service of process in each state (and pay the accompanying fees), and display fifty licenses in its offices.

C. The Loan Broker Act Also Violates the Commerce Clause as Applied to the Petitioners.

Although this Court may decide to remand and not reach the constitutionality of the Loan Broker Act, if this Court reverses Florida's decision and concludes that the Sales Act violates the Commerce Clause as applied to the Petitioners, it should also conclude, as Judge Allen did in his separate opinion, that the Loan Broker Act violates the Commerce Clause as applied to the Petitioners. Otherwise, Credicorp would have to meet all of the Sales Act requirements or refrain from engaging in certain advantageous business practices (such as collecting advance fees from customers) that are permitted to licensed in-state sellers under the Loan Broker Act.

More precisely, retail installment sellers that are licensed under the Sales Act are exempt from regulation under the Loan Broker Act. *See* Fla. Stat. Ann. § 687.14(4) (West Supp. 1997) (defining loan broker to exclude licensed retail installment sellers). This exemption allows local retail installment sellers to charge an advance fee in connection with their services without having to meet the requirements of the Loan Broker Act. *See id.* § 687.141(1) (prohibiting loan brokers from charging advance fees). [20] This effectively creates a "Hobson's choice" for out-of-state retail installment sellers such as Credicorp that do not have to constitutionally satisfy the Sales Act's requirements.

As Judge Allen concluded, since the Sales Act cannot be constitutionally applied to the Petitioners, the Loan Broker Act results in harmful discrimination because it treats out-of-state retail installment sellers, like Credicorp, differently from in-state licensed sellers. Out-of-state retail installment sellers are subject to the Loan Broker Act, but in-state, licensed retail installment

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[20] An advance fee is defined as "any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker." Fla. Stat. Ann. § 687.14(1).

sellers are exempt. Judge Allen reasoned that this forces out-of-state businesses, like Credicorp, to choose between paying an unconstitutional tax or refraining from business practices permitted to local retail installment sellers. As a result, the Loan Broker Act has the practical effect of discriminating against interstate commerce.

Accordingly, the concurring judge stated that the Supreme Court of Florida should also hold that the Loan Broker Act could not be applied to the Petitioners. *See* App. 32b. Otherwise, having no nexus with Florida except through the United States mail, Credicorp must choose between paying a license tax and meeting other licensing requirements that violate the principles of *Quill* and *Bellas Hess*, or suffering the competitive disadvantage of not being able to collect advance fees that licensed in-state retail installment sellers are permitted to collect. This is the very type of effective discrimination against out-of-state sellers that this Court routinely proscribes even in a purely regulatory context. *See, e.g., Pike*, 397 U.S. at 144-46 (fruit packing regulation discriminates against interstate commerce); *Hughes*, 441 U.S. at 336-37 (prohibition of minnow transport outside of state discriminatory). Accordingly, this Court should also grant the petition on this issue.

II. THE SUPREME COURT OF FLORIDA'S TREATMENT OF THE PETITIONERS CONFLICTS WITH RELEVANT COMMERCE CLAUSE DECISIONS OF THIS COURT.

A. Principles Developed by This Court in Commerce Clause Cases.

This Court should also grant this petition because the Supreme Court of Florida's decision conflicts with relevant decisions from this Court that prohibit states from placing undue burdens on interstate commerce. The central theme of this

Court's modern Commerce Clause doctrine is protection of the national marketplace. State restrictions that discriminate or unduly burden interstate commerce, manifested as either taxation or regulation, have historically been disfavored by this Court. *See, e.g., Tracy,* ____ U.S. ____, 117 S.Ct. at 818. While the appropriate constitutional treatment of statutory licensing schemes, such as Florida's, remains an unsettled federal question, Florida's treatment of out-of-state direct-mail marketers without a substantial nexus to the state, like Credicorp, conflicts with clear principles of Commerce Clause doctrine applied by this Court to direct-mail marketers and registration statutes.

Unquestionably, this Court has held fast to the principle that "[t]he few simple words of the Commerce Clause" reflect the central concern of the Framers that in order to succeed, "the new Union would have to avoid the tendencies toward economic Balkanization that have plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes,* 441 U.S. at 325; *see generally* The Federalist Nos. 7, 11 (Alexander Hamilton). To protect the national marketplace, the "Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state." *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534 (1949). Further, this Court has recently stressed that it is important to maintain the Commerce Clause's fundamental objective of preserving a national marketplace for competition undisturbed by preferential advantages conferred by a state upon its residents or resident competitors. *Tracy,* ____ U.S. ____, 117 S.Ct. at 818.

This Court has not wavered from enforcing the Framers' vision of a national market by striking down state legislation that places undue burdens on interstate commerce, whether such legislation is labelled a tax or a regulation. *See, e.g., Quill,* 504 U.S. at 314-15 (enforcement of use tax places unconstitutional burden on interstate commerce); *Brown-Forman Distillers Corp.*

v. New York State Liquor Auth., 476 U.S. 573, 582-84 (1986) (invalidating alcoholic beverage pricing regulation as discriminatory in effect on interstate commerce).[21] Moreover, when a state seeks to exert its taxing power on direct-mail marketers that lack a substantial nexus to the state, such levies are constitutionally impermissible. *See Quill*, 504 U.S. at 301-02; *Bellas Hess*, 386 U.S. at 758-60.

Similarly, this Court has historically found impermissible the application of state laws requiring a party to obtain a license for carrying on interstate commerce. *See Crutcher v. Kentucky*, 141 U.S. 47, 61 (1891) (Kentucky cannot require agent of express company, not incorporated under Kentucky law, to obtain license from state); *see also Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33-34 (1974) (Tennessee cotton merchant cannot be required to obtain certificate of authority from Mississippi before enforcing contract with Mississippi farmer); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278 (1961) (describing as "well established" that state cannot require out-of-state corporation to get certificate of authority to do business if its participation is limited to wholly interstate sales). As the Court in *Crutcher* made clear, "[t]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States." 141 U.S. at 57.

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[21] *See also Nippert*, 327 U.S. at 433-35 (concluding that state may not accomplish prohibition of interstate commerce in guise of taxation that produces excluding or discriminatory effect); *Real Silk*, 268 U.S. at 335-36 (striking down ordinance imposing license on sellers taxing hosiery orders to be shipped to buyers from another state as unconstitutional burden on interstate commerce under Commerce Clause).

B. The Florida Decision Is in Direct Conflict With Commerce Clause Principles Developed by This Court in Registration or Doing Business Cases.

The Supreme Court of Florida's decision also conflicts with the relevant decisions of this Court regarding state registration to do business by purely interstate business concerns. Because of the unique role such businesses play in the national marketplace, this Court prohibits states from requiring out-of-state businesses that engage in inherently interstate commerce to register to do business in the state. *Compare Crutcher,* 141 U.S. at 57-58 (company operating as common carrier throughout country cannot be required to register with particular state) *with Eli Lilly,* 366 U.S. at 278-81 (company that engages in both interstate and intrastate commerce can be required to register).

A nationwide direct-mail marketer that sells on an installment basis, like Credicorp, or out-of-state companies selling through the Internet, should not be compelled to register to do business in a state in order to engage in interstate commerce. Like the express company in *Crutcher,* Credicorp's mail order business is inherently interstate in nature. It only reaches into Florida via the United States mail and common carrier. Indeed, it is undisputed that Credicorp does not engage in intrastate business. Therefore, Florida cannot, consistent with the principles of the Commerce Clause, require Credicorp to obtain a license, register, and meet other requirements for the privilege of engaging in interstate commerce.

C. The Florida Decision Is in Direct Conflict With Commerce Clause Principles Developed by This Court as Applied to Direct-Mail Marketers.

Contrary to these fundamental Commerce Clause principles, Florida has created a statutory licensing scheme that places an undue burden on direct-mail marketers like Credicorp. Despite having no nexus with Florida and contacts only through

the United States mail, Florida requires Credicorp to do the following: (1) register as a retail installment seller, (2) pay a license tax, (3) designate and maintain an agent for service of process, and (4) conspicuously display the license. *See* Fla. Stat. Ann. § 520.32 (West Supp. 1997). Sellers that do not meet these licensing requirements suffer significant penalties and are restrained from engaging in advantageous business practices permitted to licensed sellers. *See id.* § 520.39.[22] In upholding this scheme, the Supreme Court of Florida ignored the vital lessons of *Quill* and *Bellas Hess—that a direct-mail marketer must have a substantial nexus to the state before a tax can be imposed.* By reclassifying the license "fee" as a regulatory measure, the Supreme Court of Florida facilitated a manipulation of the Commerce Clause. In effect, the Supreme Court of Florida created a judicial loophole that allows Florida to enforce a statutory scheme that is contrary to the fundamental principles of the Commerce Clause developed by this Court.

As a national direct-mail marketer, Credicorp, like Quill Corporation and National Bellas Hess, Inc., is the archetype of an enterprise engaged in the sale of goods in the national marketplace. Indeed, as Justice Stewart noted in *Bellas Hess,* "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." 386 U.S. at 759. It is vital to the maintenance of a national marketplace that such businesses are not subject to undue burdens under the guise of licensing and regulation. The Supreme Court of Florida's holding in this case is the classic example of an undue burden on interstate commerce and conflicts with the Commerce Clause principles developed in relevant cases by this Court especially as applied to direct-mail marketers.

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[22] For example, licensed sellers are entitled to collect advance fees. *See* App. 30b, 3d-4d.

If other states follow this approach, direct-mail marketers with no nexus to a state could be faced with paying a licensing tax and meeting differing licensing provisions in all fifty states on a continual basis.[23] This could inhibit the freedom of small start-up companies to market their goods through the United States mail and the Internet and significantly impact interstate commerce. This conflict provides an independent basis for this Court to grant the Petitioners' petition.

CONCLUSION

Based on the foregoing reasons, this Court should grant the Petitioners' petition for certiorari, or, alternatively, reverse *per curiam* and remand.

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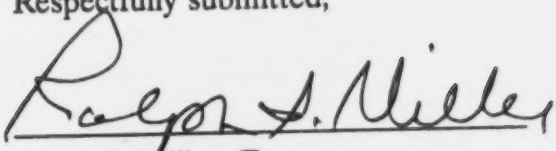
[23] Not only are they subject to fines under the Sales Act, but, as in the instant case, they may be subject to fines under other statutes (e.g., Loan Broker Act). *See, e.g.,* Fla. Stat. Ann. § 687.143(3) (West. Supp. 1997).

Respectfully submitted,



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Appendices

SUPREME COURT OF FLORIDA

Nos. 86,601, 86,624

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,
Appellant,

vs.

CREDICORP, INCORPORATED, ETC., et al.,
Appellees.

CREDICORP, INCORPORATED, ETC., et al.,
Petitioners,

vs.

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,
Respondent.

(October 31, 1996)

ANSTEAD, J.

We have for review *Credicorp, Inc. v. Department of Banking & Finance*, 659 So. 2d 376 (Fla. 1st DCA

1995), which passed upon the following questions certified to be of great public importance:

(1) MAY FLORIDA IMPOSE A LICENSING REQUIREMENT AND ANNUAL FEE UPON A RETAIL INSTALLMENT SELLER THAT ACTIVELY SOLICITS AND SELLS TO FLORIDA RESIDENTS, BUT REACHES THIS STATE ONLY BY UNITED STATES MAIL AND COMMON CARRIER?

(2) MAY FLORIDA CONSTITUTIONALLY APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, UNDER THE COMMERCE CLAUSE, MAY NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

Id. at 382, 386. We have jurisdiction. Art. V, § 3(b)(1), (4), Fla. Const.[1] We answer the first certified question in the affirmative and uphold section 520.32, Florida Statutes (1995). We decline to answer the second certified question as it is mooted by our answer to the first certified question.

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[1] The two consolidated cases *sub judice* originate from a single administrative complaint filed by the Department of Banking and Finance.

FACTS AND PROCEEDINGS BELOW

The facts of this case are set out in the hearing officer's order under findings of fact:

> 1. Credicorp, Incorporated (Credicorp) is a Texas corporation whose principal place of business is located in Dallas, Texas. Credicorp is not licensed pursuant to chapter 520, Florida Statutes, and never has been. Originally incorporated in 1990 under the name FAFCO, Credicorp began mailing solicitations to Florida in November of 1990.
>
> 2. John Rheinfrank was president of Credicorp from November of 1990 until October of 1992. Since then, Stevan Brown, who has been corporate secretary at all pertinent times, has served as president. Credicorp has no employees or agents in Florida, and owns no property in Florida. Credicorp has not registered to do business in Florida and does not collect Florida sales or use taxes.
>
> 3. Credicorp mails solicitations, also called invitations, to Florida residents and others. Before the corporate name change, invitations sent to prospects read as follows:
>
> **TELEGRAM**
>
> APPROVAL NO.: (account number specified)

APPROVAL EXPIRATION
DATE: (date specified)
(Name and address of targeted individual)

YOU HAVE BEEN PRE-APPROVED FOR A GOLD CARD WITH A $10,000 LINE OF CREDIT.

*MAIL YOUR $29.95 ANNUAL FEE BY CHECK OR MONEY ORDER BY (specified date) ALONG WITH THIS SIGNED NOTICE TO ACTIVATE YOUR CREDIT IMMEDIATELY.

FAILURE TO DO SO WILL RESULT IN OUR REEVALUATION OF YOUR ELIGIBILITY. PLEASE RETURN THIS TELEGRAPH WITH PAYMENT BY (date specified). MAKE CHECK OR MONEY ORDER PAYABLE TO FAFCO GOLD CARD.

SINCERELY,
ROBERT J. ARMSTRONG,
NEW ACCOUNTS MANAGER
RESPOND TODAY!

Petitioner's Exhibit No. 19. Robert J. Armstrong, the putative accounts manager, does not exist. Recently invitations have included a 60-day money-back guarantee and a disclaimer in small type disclosing Credicorp's lack of affiliation with a financial institution.

4. The solicitation arrives in an enveloped stamped "DATED MATERIAL: YOUR

IMMEDIATE REPLY REQUESTED," and the return address is shown as "CREDIT APPROVAL DEPT."

5. Ordinarily the solicitation contains all the information an individual receives before paying money to Credicorp to secure its services. Respondents offer potential customers residing in Florida a "Gold Card" with "a $10,000 line of credit" at a 12% annual interest rate, in exchange for a $29.95 fee.

6. The services Credicorp in fact provides to members are offers to sell merchandise, loans for purchasing the merchandise that Credicorp sells, assorted coupons, and hotel and rental car discounts. Not one of these services is clearly identified on the initial solicitation sent to potential members.

7. After the customer submits a pre-approved application and pays the membership fee, Credicorp mails a "fulfillment package." The customer must pay a $29.95 fee before Credicorp performs any service on the customer's behalf. The fulfillment package contains a letter that states, in part:

> WELCOME TO CREDICORP, YOUR LINE OF CREDIT IS $10,000.
> HERE IS YOUR CREDICORP MEMBERSHIP CARD!
> ACCOUNT #
> START USING YOUR CREDICORP MEMBERSHIP AND BONUS

COUPONS IMMEDIATELY TO PURCHASE NAME BRAND PRODUCTS FROM OUR HOME VALUES AND GIFT CATALOG. ENCLOSED IS OUR GIFT TO YOU, YOUR PREFERRED MEMBER SAVINGS COUPON BOOKLET WORTH UP TO $1,000.00 IN COUPONS REDEEMABLE IN YOUR AREA. ALSO SEE INFORMATION ENCLOSED ABOUT 50% DISCOUNTS AT THOUSANDS OF LOCATIONS THROUGHOUT THE U.S.

This letter is the first notice Credicorp gives the "new member" that he or she has joined a catalogue shopping club.

8. The fulfillment package also contains a second letter addressed "Dear New Credicorp Member," a copy of the Credicorp Rules and Regulations, a collection of Home Values and Gifts Bonus Coupons, a booklet of Super Saver coupons, and the Home Values and Gifts catalogue. For the past six months or so, the package has contained an application for a "Privilege Card."

9. A member can purchase merchandise listed in the Home Values and Gifts catalogue by completing order forms contained in the catalogue and mailing them, along with payment, to Credicorp. Credicorp extends members a line of credit of up to $10,000 to purchase this merchandise. The member's "Gold Card" number

must be included when ordering products from the catalogue.

10. A member cannot use the "Gold Card" to purchase goods or services from retail sellers other than Credicorp. Members cannot use their "Gold Cards" or their membership to obtain cash from anybody. The Better Business Bureau of Texas received over 34,000 inquiries in 1992 regarding Credicorp's activities.

11. Credicorp receives a mark-up on the merchandise it sells to members. Members who purchase merchandise on credit must initially submit a specified down payment with the order. Two prices are available to a Credicorp member, a cash price and a "credit price," which reflects a 12% financing fee. Merchandise purchased on credit arrives with an installment coupon book for each item ordered.

12. The Credicorp Rules and Regulations, the order forms contained in the catalogue, and all other materials Credicorp provides members make no mention of any contingency once the member completes, signs and sends in a form order for merchandise with the amount of money required. Many Florida residents complete and sign these order forms in Florida. Credicorp has received at least 378 form orders for merchandise from Florida residents.

13. Approximately 1,600,000 individuals have submitted to Credicorp membership applications, each accompanied by $29.95. New

members' names and addresses are entered into a computer data base and "batch edit sheets," each listing 100 names of new members, are printed.

14. Sample batch edit sheets obtained from Credicorp by the Department listed the names of 640 Florida residents who had sent a membership application form and $29.95 to Credicorp to obtain membership. On a single day, June 24, 1992, money and membership application forms from 243 residents of Florida reached Credicorp.

On the basis of these findings of fact, the hearing officer recommended the imposition of sanctions against Credicorp, John Rheinfrank,[2] who served as Credicorp's president until his departure from the company in the fall of 1992, and Steven Brown who served as its vice-president, treasurer and secretary prior to becoming the company's president after Rheinfrank's departure, in their capacity as officers of Credicorp. In partial support of the recommendation, the hearing officer concluded that "One purpose Chapter 520 evinces is to protect Florida consumers from misleading solicitations." In essence, the hearing officer found, as detailed in the findings of fact, that Credicorp had engaged in extensive deceptive practices in its solicitations of Florida consumers. Subsequently, the Department approved the findings of the hearing officer and ordered Credicorp to cease and desist certain activities under both chapters 520 and 687, Florida Statutes (1991). The Department also imposed substantial administrative fines against Credicorp, Rheinfrank, and Brown.

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[2] Mr. Rheinfrank died on October 25, 1993.

APPEAL

On appeal to the First District, the district court affirmed in part, reversed in part, and certified two questions to this Court. The court held that (1) Credicorp was a retail installment seller under the Act, (2) the licensing requirements of the Retail Installment Sales Act could not be applied to Credicorp without violating the Commerce Clause, (3) Credicorp was a loan broker as defined in section 687.14, Florida Statutes (1991), and (4) the Loan Broker Act applied to Credicorp and did not violate the Commerce Clause. *Credicorp, Inc. v. Department of Banking & Finance*, 659 So. 2d 376 (Fla. 1st DCA 1995). The district court indicated that, absent controlling precedent, it would uphold the application of the licensing requirements of chapter 520 to Credicorp as a valid state regulatory measure and the imposition of sanctions under that chapter.

FIRST CERTIFIED QUESTION

The United States Constitution empowers Congress "To regulate Commerce with foreign Nations, and among the several States." Art. I, § 8, cl. 3, U.S. Const. The purpose of this provision was to ensure the free and unimpeded transportation and exchange of goods between the states. *Armstrong v. City of Tampa*, 118 So. 2d 195, 199 (Fla. 1960). On its face, the Commerce Clause is an affirmative grant of power to Congress. However, the negative implication of the clause--that the states cannot exercise power reserved to Congress--is the source of the constitutional limits on state regulation and taxation of interstate commerce.

Generally speaking, statutes that represent the exercise of a state's police power are given less scrutiny under the Commerce Clause than those statues enacted to raise revenue for the state.[3] Several reasons have been cited for the distinction between taxation and regulation. First, "[a] police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests." *Freeman v. Hewit*, 329 U.S. 249, 253, 67 S. Ct. 274, 277, 91 L. Ed. 265 (1946). Second,

> [t]o deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function.

Id. Third, "the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly

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[3] However, as Justice Frankfurter aptly commented:

> A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power than under manifestations of policy power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial.

Freeman v. Hewit, 329 U.S. 249, 252-53, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

> less uncertain in its consequences, than results from the usual police regulations."

Id. In short,"[b]ecause the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce."

Id. Thus, determining the nature of the statute at issue is pivotal for purposes of analysis under the Commerce Clause. *See Freeman v. Hewit*, 329 U.S. 249, 253, 67 S. Ct. 274, 277, 91 L. Ed. 265 (1946)("The task of scrutinizing is a task of drawing lines."); *see also Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854 (1996) (outlining constitutional tests for "state regulatory measures" versus "state taxation").

Accordingly, central to a Commerce Clause analysis here is whether section 520.32 constitutes (1) a general revenue tax, or (2) a regulatory measure enacted pursuant to this state's police power. *See California v. Thompson*, 313 U.S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941). Initially, we concluded that the fees charged by the State and the licensing requirements under chapter 520 constitute attempts at regulation rather than taxation.

TAXATION

To ensure that revenue taxes do not violate the principle that no state may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business,"

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458, 79 S. Ct. 357, 362, 3 L. Ed. 2d 421 (1959), the Supreme Court has required that any state tax on interstate commerce must be (1) applied to an activity with a substantial nexus with the taxing state, (2) fairly apportioned, (3) nondiscriminatory against interstate commerce, and (4) fairly related to the services provided by the state, in order to pass constitutional muster. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Under this analysis, the Supreme Court has held that out-of-state mail order sales companies like Credicorp, which have no physical presence in the taxing state, are immune from state sales or use tax liability. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753, 758, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). We have recently reaffirmed that principle in the case of *Department of Revenue v. Share International, Inc.*, 676 So. 2d 1362 (Fla. 1996), wherein we held that an out-of-state mail order sales company could not be compelled to pay or collect Florida sales or use taxes on its mail-order sales to Florida residents. In essence, this is the standard that was applied by the district court in holding that Credicorp, because it lacked a physical presence in Florida, could not be subject to licensing and regulation in Florida.

REGULATION

This stringent standard for appraising tax measures, however, does not strictly apply if the statute at issue qualifies as a regulatory measure. "General revenue taxes are state taxes levied against interstate commerce to raise general revenue." *Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139, 142 (4th Cir. 1994). Where a regulation is not

essentially economic in purpose and effect, however, but is a social regulation designed to protect local interests, different considerations apply. *Breard v. City of Alexandria*, 341 U.S. 622, 638-39, 71 S. Ct. 920, 930-31, 95 L. Ed. 1233, 1246-47 (1951). In fact, the Supreme Court has recognized:

> [T]here are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court . . . .

Thompson, 313 U.S. at 113. "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens . . . ."

Maine v. Taylor, 477 U.S. 131, 151, 106 S. Ct. 2440, 2454, 91 L. Ed. 2d 110 (1986) (citation omitted). In this regard, the district court observed:

Specifically, in *Taylor [Maine v. Taylor]*, the Court held:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

The Court in *Thompson [California v. Thompson]* went on to note:

> [F]raudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated.

659 So. 2d at 381 (citations omitted).

CHAPTER 520

Chapter 520, Part II, Florida Statutes (1995), contains an extensive regulatory scheme governing retail installment contracts. Section 520.32 provides in material part:

> (1) A person may not engage in or transact the business of a retail seller engaging in retail installment transactions as defined in this party or operate a branch of such business without a license, except that a license is not required for a retail seller whose retail installment transactions are limited to the honoring of credit cards issued by dealers in oil and petroleum products licensed to do business in this state.

Section 520.32(2) requires a retail installment seller to pay a $200 fee for obtaining this license. After two years, a retail installment seller must renew its license by paying another $200 fee. *Id.* § 520.32(3). This license was clearly intended to reach mail-order sales. *Id.* § 520.36.[4]

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[4] Section 520.36, Florida Statutes (1995), provides:

> Mail order and telephone sales. —Retail installment contracts negotiated and entered into by mail or telephone without personal solicitation by salesmen or other representatives of the seller, when a catalog of the seller or other printed solicitation of business which is distributed and made available generally to the public clearly sets forth the cash price and other terms of sales to be made through such medium, may be made as provided in this section. All of the provisions of this part relating to contracts shall apply to such sales except that the seller shall not be required to deliver a copy of the

(continued...)

All funds received must be deposited into the Regulatory Trust Fund. § 520.998, Fla. Stat. (1995). Section 520.34 requires persons within and outside of Florida who wish to enter into retail installment sales to Florida residents to comply with its regulations. The fee provisions of chapter 520 ensure that all regulated licensees pay a share of the regulatory costs to protect Florida consumers from improper conduct by the licensees. Moreover, the statute requires that fitness for licensure be demonstrated initially and maintained thereafter.

In policing retail installment sales, the Department of Banking and Finance is authorized to conduct investigations and examinations, *see* section 520.996, Florida Statutes (1995), issue and serve subpoenas, administer oaths, seek injunctions, issue cease-and-desist orders, and impose administrative fines. § 520.994, Fla. Stat. (1995). The department may deny an application for license or revoke a license where, as has been established in the case at bar, there have been misrepresentations in retail installment transactions. § 520.995(1)(b), 2(a), 2(b), Fla. Stat. (1995). Accordingly, it appears that chapter 520 was not enacted as a measure to raise general revenue and does not impose a "tax" on interstate commerce for that

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[4] (...continued)
contract to the buyer as provided in § 520.34(1)(c), and if the contract when received by the seller contains any blank spaces, the seller may insert in the appropriate blank space the amounts of money and other terms which are set forth in the seller's catalog or other printed solicitation which is then in effect. In lieu of sending the buyer a copy of the contract as provided in § 520.34(1)(c), the seller shall deliver to the buyer, not later than the date the first payment is due, a written statement of all disclosures required by this part. The seller shall be required to deliver a copy of the contract to the buyer at any time not later than when the first payment is due.

purpose. Rather, it was enacted to provide consumer protection for Florida residents by requiring retail installment sellers to be licensed and to abide by the regulations set out in the chapter.

We must now determine whether the particular regulatory scheme set out in chapter 520 violates the Commerce Clause. To ensure that regulatory measures do not violate the Commerce Clause, the United States Supreme Court has devised a balancing test to assess the constitutionality of such measures. In determining the validity of a regulatory statute challenged under the Commerce Clause, a court must inquire:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L. Ed. 2d 250 (1979); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). We find that the regulatory measure here meets all of the criteria set out in *Hughes*.

Numerous decisions have recognized and approved of a state's regulation of matters of local concern even though interstate commerce may be incidentally affected. *See, e.g., Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154 (6th Cir. 1993); *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43 (1st Cir. 1984); *Aldens, Inc. v. LaFollette*. 552 F.2d 745 (7th Cir. 1977); *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742 (N.D. Ohio 1995); *People v. Fairfax Family Fund, Inc.*, 47 Cal. Rptr. 812 (Cal. Ct. App. 1964); *National Salvage & Serv. Corp. v. Commissioner of the Indiana Dep't of Envtl. Mgmt.*, 571 N.E.2d 548 (Ind. Ct. App. 1991); *Borough of Collingswood v. Ringgold*, 331 A.2d 262 (N.J. 1975). We are particularly persuaded by the reasoning of three decisions involving state regulatory statutes similar to chapter 520.

Aldens Inc.

In *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977), *cert. denied*, 434 U.S. 880, 98 S. Ct. 236, 54 L. Ed. 2d 161 (1977), Aldens, an Illinois corporation, was selling merchandise by mail order in Wisconsin. Aldens asserted that Wisconsin's Consumer Act, which protects its residents from abuses in credit transactions, was void in its application to Aldens under the Commerce Clause. 552 F.2d at 746-47. In its analysis of the Commerce Clause issue, the Seventh Circuit distinguished *National Bellas Hess, Inc.*—a "tax" case—from the case before it—"an exercise of the police power." Consequently, the court applied a balancing test—state regulations involving a legitimate state interest are not invalid because they affect interstate commerce unless the burden on such commerce is, on balance, clearly excessive in relation to local benefits. *Id.* at 749. Because it concluded that under the

balancing test the Wisconsin Consumer Act was not an undue burden on interstate commerce, it upheld the Act. *Id.* at 753.

The facts of the *Aldens* case are very similar to those presented here. Aldens had no Wisconsin office nor any representative or tangible property there. Aldens mailed catalogs to Wisconsin residents four times a year and also mailed them supplemental advertisements six to eight times a year. Merchandise sold by Aldens to Wisconsin customers was sent to them by mail or common carrier from outside Wisconsin. Aldens did not advertise in the Wisconsin media and had no Wisconsin telephone listing. Further, Aldens was not required to collect and remit the Wisconsin use tax. *Id.* at 747-48. It would be difficult to find a factual situation more analogous to the facts here.

Center for Auto Safety, Inc.

The Fourth Circuit has also held that user fees charged for regulation should be distinguished from general revenue taxes for purposes of Commerce Clause analysis. *Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1401, 131 L. Ed. 2d 289 (1995). In *Athey*, the court upheld a Maryland statute regulating out-of-state charitable organizations' solicitation practices in Maryland. The statute imposed a sliding scale fee on a charity, whether in state or out, based on a charity's nationwide level of public contributions.

At the outset, the court indicated that central to the Commerce Clause analysis in the case was whether the statute constituted a general revenue tax or a "user fee" assessed to constituted a general revenue tax or a "user fee"

assessed to defray the costs of state-provided services. *Id.* at 142. A general revenue tax, the court acknowledged, is a state tax levied against interstate commerce to raise general revenue and is subject to the stringent four-part test set out in *Complete Auto Transit*. On the other hand, the court reasoned that this stringent standard does not apply when the state tax at issue is a "user fee." User fees are taxes or other fees collected by the state as reimbursement for use of state-owned or state-provided facilities or services such as those provided by the state in regulating particular commercial practices. The court believed the "Supreme Court has drawn a clear distinction between user fees and general revenue taxes, noting that "[b]ecause [user fees] are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services,' they 'are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply.'" *Id.* The court noted that the "rationale for this distinction is that, where taxes are narrowly drawn to reimburse a state for its expenses, the possibility that the tax will discriminate against interstate commerce is sharply diminished." *Id.*

Citing United States Supreme Court precedent, the court held that to qualify as a constitutional user fee, a state tax must (1) reflect a fair, if imperfect, approximation of the cost of using state facilities for the taxpayer's benefit, (2) not discriminate against interstate commerce, and (3) not be excessive in relation to the costs incurred by the taxing authorities.[5] The court concluded that, under these principles, "the sliding scale fee imposed under the

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[5] *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972).

Maryland Statute is a constitutionally sound user fee." *Id.* at 143. Once again, although solicitation by charities is the activity regulated rather than installment sales, we find the regulatory scheme in Maryland to be similar to the regulatory scheme involved herein.

Fairfax Family Fund, Inc.

Finally, in *People v. Fairfax Family Fund, Inc.*, the California appellate court held that a Kentucky corporation engaged in the business of making small loans by mail to residents of California was subject to California regulation. The defendant maintained no offices in California. The defendant solicited its business by mailing printed material from Kentucky to persons in California. The borrower returned by mail a loan application and promissory note, and the defendant secured a California independent contractor to conduct a local credit investigation. After approval, the defendant mailed a check to the borrower, who made all payments on the loan by mail to the defendant's offices in Kentucky.

The Kentucky corporation did business in thirty-one other states, but had loans of $3,500,000 outstanding to California residents, and was increasing the amount of loans to them at a rate of about $90,000 per week. Despite the amount of loans made to California residents, the defendant never secured a small loan license as required by California Financial Code section 24200 which provided: "No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the commissioner."

The California appeals court held that the Commerce Clause had not withdrawn from the state the power to regulate or control matters of local concern so long as Congress had not acted in the area, the regulation was nondiscriminatory, and the regulation did not impose a burden on interstate commerce. 47 Cal. Rptr. at 813. The court held California had the power to license and regulate this business the same as local loan companies.

The district court below noted the similarity of this case to *Fairfax Family Fund*:

> In *Fairfax Family Fund*, the California appeals court noted that the small loan law, which serves primarily to protect citizens of California from fraudulent and unconscionable conduct of those in the lending business, constitutes a matter of local concern for the purpose of determining whether it violates the Commerce Clause insofar as a lender engaged in interstate commerce is concerned. 47 Cal. Rptr. at 813. The Commerce Clause does not preclude a state from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation is general in its scope, is not aimed at interstate or foreign commerce, and merely involves burdens incident to effective administration. 47 Cal. Rptr. at 815. The court noted that no question of discrimination existed because the statute applied to both interstate and intrastate lending agencies. The court explained that the degree of regulation is not

> disproportionate to the evils that exist if the lenders are left to their own devices without regulation by the state. *Id.* The licensing procedure imposes charges or expenses no larger in amount than are reasonably necessary to defray the administrative costs involved and could not, in any event, qualify as discriminatory or imposing undue restrictions on interstate commerce. *Id.* To deny the state the power to license and regulate this business as it does for local concerns engaging in the same business would, in effect, grant an immunity to which it is not entitled under the circumstances. *Id.* The court noted that '[a]s a practical matter, it would be next to impossible for the state to regulate the activities of this business without the license requirement.' *Id.* Finally, the court observed that when the burdens imposed by local legislation become too great, Congress may legislate to secure uniformity or to protect the national interest as this is a legislative, not a judicial, function. *Id.*

Credicorp, 659 So. 2d at 381-82. We are in agreement with the district court's analysis.

Based on the approach of the above "regulatory" cases, we conclude the regulatory and licensing provisions in chapter 520 constitute permissible regulation and are not violative of the Commerce Clause. On this issue we agree with the district court:

> The instant case is analogous to the above regulatory cases. The licensing provision in section 520.32 involves a local concern that the state has the power to regulate, that has not been regulated by Congress, and that does not discriminate against, or in any respect unnecessarily obstruct, interstate commerce. Moreover, the provision is designed to safeguard the people of Florida from deceitful practices and conduct such as that undertaken by Credicorp.
>
> In our view, the Florida Legislature envisioned the licensing of retail installment sellers such as Credicorp. Section 520.36, entitled "Mail order and telephone sales," indicates the legislative intent to include within the licensing provisions retail installment contracts negotiated and entered into by mail or telephone.

Id. at 382. Pursuant to the provisions of chapter 520, it appears the Department is attempting to prohibit misrepresentations by retailers, whether in state or out, regarding ongoing retail installment contracts with residents of the State of Florida. The statute is designed to safeguard the people of Florida from deceitful practices and conduct such as that allegedly undertaken by Credicorp. *Id.* In fact, section 520.331 is specifically aimed at disciplining retail installment sellers who engage in fraud,

misrepresentation, deceit, or gross negligence.[6] As noted by the hearing officer, one purpose of chapter 520's regulatory scheme is to "protect Florida consumers from misleading solicitations." It is also apparent that Credicorp's solicitation activities in Florida have been extensive. The hearing officer cited a single day's activity in 1992 reflecting that 243 Florida residents had sent money and application forms pursuant to Credicorp's promise of a "GOLD CARD WITH A $10,000 LINE OF CREDIT."

On the other hand, *Bellas Hess* and the other cases relied upon by Credicorp are sales and use tax cases. That is not the case here. Any fees charged here are patently intended to offset the costs to government of regulating retail installment sales. As noted by Justice Scalia in his separate opinion in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), courts should apply United States Supreme Court cases that specifically fit the situation in dispute, 504 U.S. at 319 (Scalia, J., concurring). The district court also quoted an important observation in Justice Scalia's concurring opinion in *Quill Corp.*:

> "Even before *Bellas Hess*, we had held, correctly, I think, that state regulatory jurisdiction could be asserted on the basis of contracts with the State through the United States mail. *See Travelers Health Assn. v. Virginia ex rel. State Corp. Comm'n*, 339

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[6] *But see State v. Mobley*, 66 S.E.2d 12, 19 (N.C. 1951) ("While it may be conceded that regulations designed to prevent frauds are embraced within the scope of the police power, nevertheless an express purpose to prevent possible frauds does not justify state legislation which really goes beyond the legitimate pale of regulation and interferes with the free flow of interstate commerce.") (citations omitted).

> U.S. 634, 646-650, 70 S. Ct. 927, 928-931, 94 L. Ed. 1154 (1950) (Blue Sky laws)." 504 U.S. at 298, 112 S. Ct. at 1904.

659 So. 2d at 381. It would appear that the United States Supreme Court has itself limited the law of *Bellas Hess* to tax cases. We follow Justice Scalia's lead here.

We find that the licensing provision in section 520.32 involves a local concern that the state has the power to regulate, that has not been regulated by Congress, and that does not discriminate against, or in any respect unnecessarily obstruct, interstate commerce. *See California v. Thompson*, 313 U.S. 109, 114 (1941) ("Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation."); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S. Ct. 227, 61 L. Ed. 498 (1917). In fact, absent the enforcement of Florida's regulatory scheme, it is apparent that Credicorp's solicitations of Florida citizens could continue unabated and without sanction. We do not believe that Congress, or the Supreme Court in its interpretation of the Commerce Clause, has mandated such an outcome.

Accordingly, we answer the first certified question in the affirmative and hold that section 520.32 is a regulatory measure and, because of its evenhanded application to all retail installment sellers, is not violative of the Commerce Clause. We quash the decision of the district court on the constitutionality of section 520.32. By answering the first certified question in the affirmative and upholding section 520.32, we have mooted the second certified question. Accordingly, we decline to answer the second certified question. We recognize that our opinion is

contrary to the district court's conclusion as to the validity and application of section 520.32 and that our holding may impact the resolution of the other issues raised in the district court. For that reason, we remand this case to the district court to address or reconsider any remaining issues as the district court may find necessary.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

TWO CASES CONSOLIDATED:
An Appeal from the District Court of Appeal — Statutory or Constitutional Invalidity; and a Notice for Review of the Decisions of the District Court of Appeal • Certified Great Public Importance

First District — Case No. 94-440

Paul C. Stadler, Jr., Assistant General Counsel, and Robert A. Fox, Assistant General Counsel, Office of the Comptroller, Tallahassee, Florida,

for Appellant/Respondent

William E. Williams, Rex D. Ware and Vikki R. Shirley of Huey, Guilday & Tucker, P.A., Tallahassee, Florida,

for Appellees/Petitioners

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 94-440

CREDICORP, INCORPORATED, a Texas corporation, JOHN RHEINFRANK, individually and as President of Credicorp, Inc., and STEVEN W. BROWN, individually and as Vice President of Credicorp, Inc.,

Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Appellee.

_____/

Opinion filed July 17, 1995.

An appeal from an Order of the Department of Banking and Finance.

William E. Williams, Rex D. Ware, and Vikki R. Shirley of Huey, Guilday & Tucker, P.A., Tallahassee, for appellants.

Bridget L. Ryan, Assistant General Counsel, Department of Banking & Finance, Tallahassee, for appellee.

KAHN, J.

This is an appeal from a final order entered by appellee, the Department of Banking and Finance (Department), on January 14, 1994, ordering Credicorp, Inc. (Credicorp) to cease and desist certain activities under chapters 520 and 687, Florida Statutes, and imposing administrative fines totalling $4,078,000 against appellants Credicorp, John Rheinfrank,[1] who served as its president until his departure from the company in the fall of 1992, and Steven Brown, who served as its vice-president, treasurer and secretary prior to becoming the company's president after Rheinfrank's departure. Appellants were specifically charged with violating the licensing provisions for retail installment contractors found in section 520.32,[2]

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[1] Mr. Rheinfrank died on October 25, 1993.

[2] Section 520.32, Florida Statutes, provides in material part:

> (1) A person may not engage in or transact the business of a retail seller engaging in retail installment transactions as defined in this part or operate a branch of such business without a license, except that a license is not required for a retail seller whose retail installment transactions are limited to

(continued...)

Florida Statues, and the loan broker provisions in section 687.141,[3] Florida Statutes. Appellants contend that (1) the licensing provisions for retail installment sellers in sections 520.30-.42 violate the Commerce Clause in the Constitution of the United States; (2) even if the licensing provisions do not violate the Commerce Clause, they do not apply to Credicorp because they do not cover retail installment contracts not entered into in Florida; (3) because Credicorp is not a loan broker as defined in section 687.14(4),[4] it did

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[2] (...continued)
the honoring of credit cards issued by dealers in oil and petroleum products licensed to do business in this state.

[3] Section 687.141 provides:

> No loan broker shall:
> (1) Assess or collect an advance fee from a borrower to provide services as a loan broker.
> (2) Make or use any false or misleading representations or omit any material fact in the offer or sale of the services of a loan broker or engage, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a loan broker, notwithstanding the absence of reliance by the buyer.
> (3) Make or use any false or deceptive representation in its business dealings or to the department or conceal a material fact from the department.

[4] Section 687.14(4) defines "loan broker" as:

> [A]ny person, except any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, securities broker-dealer, real estate broker or salesperson, attorney, federal Housing Administration approved lender,
> (continued...)

not violate the provisions of section 687.141 by collecting an advance fee from borrowers in exchange for its services as a loan broker; and (4) the penalty[5] imposed is unduly harsh. We affirm in part and reverse in part the Department's final order.

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[4] (...continued)

credit card company, installment loan licensee, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license; ... who:

(a) For or in expectation of consideration arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit;

(b) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit or related guarantee, enhancement, or collateral of any kind or nature.

(c) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or

(d) Holds himself out as a loan broker.

[5] Penalties were imposed pursuant to section 687.143(3), Florida Statutes (1991), which provides:

(3) The department may impose and collect an administrative fine against any person found to have violated any provision of this act, any rule or order promulgated by the department, or any written agreement entered into with the department in any amount not to exceed $5,000 for each violation. All fines collected hereunder shall be deposited in the Division of Finance Regulatory Trust Fund.

I

Credicorp, originally incorporated under the name FAFCO in 1990, is a Texas corporation not authorized to do business in Florida. Credicorp operates a nationwide mail-order catalog business, and its only place of business is in Dallas, Texas. Credicorp has been operating in Florida since 1990, but none of its offices, employees, or independent contractors are located in Florida. Its services include providing discount coupons for retail establishments and privilege card benefits for discounts at hotels and car rental agencies. It advertises in Florida by sending solicitations to Florida residents. Certain solicitation forms placed in the record read:

TELEGRAM
Approval No.:

[account number specified]
Approval Expiration Date: [date specified]
[Name and address of targeted individual]

Congratulations [targeted individual],

You have been pre-approved for a Gold Card with a $10,000 line of credit.

*Mail your $29.95 annual fee by check or money order by (specified date) along with this signed notice to activate your credit immediately.

Failure to do so will result in our reevaluation of your eligibility. Make check or money order payable to Credicorp Gold Card.

Sincerely,
Robert J. Armstrong
New Accounts Manager
Respond Today!

Recently the solicitations have included a 60-day money back guarantee and a disclaimer in small type indicating Credicorp's lack of affiliation with a financial institution. For the relevant time period, the above solicitation constituted the only document provided to a Florida consumer before the consumer responded by sending money to Credicorp. The solicitation does not list any services that Credicorp provides and does not indicate that the "Gold

Card" is actually a catalog card that can only be used to purchase merchandise from Credicorp's catalogs.

As of June 1993, approximately 1,600,000 individuals nationwide had submitted membership applications and paid the $29.95 annual fee to Credicorp. On a single day, June 24, 1992, Florida residents sent Credicorp 243 applications, each accompanied by $29.95. A small sampling of Credicorp's membership records established that Credicorp solicited advance fees from at least 640 Florida residents. From a quick review of order forms in the record, it appears that Credicorp has received over one thousand merchandise orders from Florida residents.

After the customer submits a preapproved application and pays the membership fee, Credicorp mails a "fulfillment package" to the customer. This package was the first notice to the consumer that he or she has joined a catalog shopping club. The fulfillment package includes a "Home Values and Gifts" catalog to facilitate purchases from Credicorp. The customer may then purchase merchandise by submitting a completed and signed order form, contained in the catalog, to Credicorp. According to the price list and terms of Credicorp's catalog shopping program, two prices were available to a Credicorp customer—a cash price plus shipping and handling or a credit price with a 12% financing fee. A credit order requires a cash down payment. Any merchandise purchased on credit arrives with an installment coupon book for each item ordered. Upon receipt of an order form, Credicorp verifies the customer's current membership, the status of the member's account, and the availability of items ordered. After approval, Credicorp fills the order and ships

the merchandise from Texas to the out-of-state customer via interstate carrier.

In July 1992, the Department advised Credicorp that it might be acting as a loan broker in violation of chapter 687, Florida Statutes. Subsequently, the Department advised Credicorp that it might also be an unlicensed retail installment seller in violation of chapter 520, Florida Statutes. Credicorp sent a letter in response, indicating its position that it does not do business in Florida and, even if it did, it does not fall within the definition of "loan broker" because it arranges credit only between its customers and itself.

On January 13, 1993, the Department filed an administrative complaint charging Credicorp with violating various provisions of chapters 516, 520, 687 and 817, Florida Statutes. Before the final hearing, the Department withdrew its allegations that Credicorp violated chapters 516 and 817. The Department alleged Credicorp was a "loan broker" under chapter 687 and was violating section 687.141 by collecting an advance fee from borrowers in exchange for its services as a loan broker and making misleading representations or omissions in connection with the offer or sale of its services. The Department also alleged that Credicorp was an unlicensed retail installment seller in violation of section 520.32(1). Credicorp timely filed a response to the administrative complaint and requested a formal hearing.

On July 23, 1993, a DOAH hearing officer convened an administrative hearing. The Department called its lead investigator as its only witness and placed in the record numerous examples of solicitations, membership fulfillment packages, and order forms. On October 4,

1993, the hearing officer issued findings of fact and conclusions of law recommending that the Department order Credicorp to cease and desist all activities in violation of chapter 687, levy an administrative fine against Credicorp in the amount of $3,578,000 and assess additional fines of $250,000 against Rheinfrank and Brown in their capacity as officers of Credicorp under chapter 687. The Department's final order essentially adopted the hearing officer's preliminary statement, findings of fact and conclusions of law except that it rejected the hearing officer's finding that Credicorp's solicitations operated as a fraud or deception upon Florida residents. Although the hearing officer did not include a specific recommendation that Credicorp cease and desist any activities in violation of chapter 520, the Department so ordered. Credicorp timely appealed.

II

APPLICATION OF LICENSING PROVISIONS TO INTERSTATE COMMERCE

The Department adopted the hearing officer's conclusion that "Florida's requirement that all retail installment sellers[6] doing business in Florida be licensed does not unduly burden interstate commerce and does not discriminate in any way against interstate commerce." As the reviewing court, however, we must reach our own determination concerning the constitutional validity of the licensing requirement as applied to a corporation with no physical presence in Florida.

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[6] Credicorp agrees that it is a retail installment seller.

The Commerce Clause of the United States Constitution prohibits a state from imposing a use tax upon a nonresident business which solicits orders from the state's residents, but maintains no contact with the state except by mail or interstate carrier. *Quill Corp. v. North Dakota*, __ U.S. __, 112 S. Ct. 1904, 119 L.Ed. 2d 91 (1992); *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 754, 758, 87 S.Ct. 1389, 18 L.Ed. 2d 505 (1967) ("[this] Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with the customers in the State is by common carrier or the United States mail"). Florida courts have also applied this prohibition to the imposition of a license tax. *Olan Mills v. City of Tallahassee*, 100 So. 2d 164 (Fla. 1958), *cert. denied*, 359 U.S. 924, 79 S.Ct. 604, 3 L. Ed. 2d 627 (1959) (where corporation was engaged in interstate commerce exclusively in taking photographs beyond the borders of the state, the city ordinance imposing license taxes on all photographers within the city was invalid as to corporation as attempt to place a direct tax on privilege of engaging in interstate commerce); *Armstrong v. City of Tampa*, 118 So. 2d 195 (Fla. 1960) (flat-sum license or privilege tax applied to Avon impeded flow of interstate commerce and therefore violated Commerce Clause because it was imposed on solicitors as a condition precedent to engaging in interstate commerce and was subject to being duplicated by every community into which Avon might enter); *City of Tampa v. Carolina Freight Carriers Corp.*, 529 So. 2d 324 (Fla. 2d DCA 1988) (occupational license tax, as applied to Carolina Freight's facility, violates Commerce Clause). We are constrained by these cases and find the licensing provisions in chapter 520 may not be constitutionally applied to Credicorp because they constitute a flat-sum licensing tax which, according to the above cases, violates the Commerce Clause. If we were writing

on a clean slate, we would hold otherwise. Although the licensing provision in section 520.32(2) requires each retail installment seller to pay a "non-refundable application fee not exceeding $200" and section 520.32(3) further requires payment of a "renewal fee not exceeding $200," the licensing provision is, in our view, not merely a tax. It is first and foremost state regulation of a matter of local concern through the police power.

The instant case is similar to *California v. Fairfax Family Fund, Inc.*, 347 Cal. Rptr. 812 (Cal. Dist. Ct. App. 1964), *appeal dismissed*, 382 U.S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965). In that case the court held that a Kentucky corporation engaged in the business of making small loans by mail to residents of California and 31 other states, which had loans of $3,500,000 outstanding to California residents and was increasing the amount of loans to them at a rate of about $90,000 per week, was doing business in California and, as a result, California had the power to license and regulate this business the same as local concerns. The defendant solicited its business by mailing printed material from Kentucky to persons in California. The borrower returned by mail a loan application and promissory note, and the defendant secured a California independent contractor to conduct a local credit investigation. After approval, the defendant mailed a check to the borrower, who made all payments by mail to the defendant's offices in Kentucky. The defendant maintained no offices in California, nor did any of its corporate officers reside in that state. Despite the amount of loans made to California residents, the defendant never secured a small loan license as required by California Financial Code section 24200 which provided: "No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action,

in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the commissioner."

The California appeals court held that the Commerce Clause has not withdrawn from the state the power to regulate or control matters of local concern so long as Congress has not acted in the area,[7] the regulation is nondiscriminatory, and the regulation does not impose a burden on interstate commerce. 47 Cal. Rptr. at 813. Our review of the case law suggest the correctness of that proposition. *See California v. Thompson*, 313 U.S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941) (Court held that statute requiring every transportation agent to procure license from State Railroad Commission pay license fee, and file bond does not violate Commerce Clause in absence of pertinent regulation by Congress and where regulation does not unnecessarily obstruct interstate commerce, affects matters of local concern which are in other respects within state regulatory power, and where regulation does not infringe on national interest in maintaining free flow of commerce and preserving uniformity in regulation of commerce); *Robertson v. California*, 328 U.S. 440, 447, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946) ("We are far beyond the time when, if ever, the word 'license' *per se* was a condemnation of state regulation of interstate business done within the state's borders . . . . For the commerce clause is not a guarantee of the right to import into the state whatever one may please, absent a prohibition by Congress, regardless of the effect of the importation upon the local community.") In areas affecting the health, life and safety

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[7] The parties in the present case have advised the court that Congress has not acted to regulate or license retail installment sellers.

of their citizens, the courts have allowed reasonable and nondiscriminatory regulation. *Maine v. Taylor*, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (ban on imported baitfish did not violate Commerce Clause in that it served legitimate local purpose, *i.e.*, protecting native fisheries from parasitic infection and adulteration by non-native species, that could not be served as well by available nondiscriminatory means); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 930, 85 L. Ed. 1219 (1960); *Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059 (S.D. Ohio 1992), *aff'd.*, 991 F.2d 796 (6th Cir. 1993), *Mercer v. Hemmings*, 170 So. 2d 33 (Fla. 1964) (statute requiring out-of-state CPAs to obtain certificate to practice in Florida did not violate Commerce Clause because of state's legitimate interest in maintaining standards of that profession).

Specifically, in *Taylor*, the Court held:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

477 U.S. at 151 (citation omitted).

The Supreme Court has recognized:

> [T]here are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court.

Thompson, 313 U.S. at 113. The Court in *Thompson* went on to note:

> [F]raudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated.

313 U.S. at 114. Justice Scalia, concurring in the judgment in *Quill Corp.*, wrote, "Even before *Bellas Hess*, we had held, correctly, I think, that state regulatory jurisdiction

could be asserted on the basis of contacts with the State through the United States mail. *See Travelers Health Assn. v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 646-650, 70 S. Ct. 927, 928-931, 94 L. Ed. 2d 1154 (1950) (Blue Sky laws)." 112 S. Ct. at 1904.

In *Fairfax Family Fund*, the California appeals court noted that the small loan law, which serves primarily to protect citizens of California from fraudulent and unconscionable conduct of those in the lending business, constitutes a matter of local concern for the purpose of determining whether it violates the Commerce Clause insofar as a lender engaged in interstate commerce is concerned. 47 Cal. Rptr. at 813. The Commerce Clause does not preclude a state from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation is general in its scope, is not aimed at interstate or foreign commerce, and merely involves burdens incident to effective administration. 47 Cal. Rptr. at 815. The court noted that no question of discrimination existed because the statute applied to both interstate and intrastate lending agencies. The court explained that the degree of regulation is not disproportionate to the evils that exist if the lenders are left to their own devices without regulation by the state. *Id.* The licensing procedure imposes charges or expenses no larger in amount than are reasonably necessary to defray the administrative costs involved and could not, in any event, qualify as discriminatory or imposing undue restrictions on interstate commerce. *Id.* To deny the state the power to license and regulate this business as it does for local concerns engaging in the same business would, in effect, grant an immunity to which it is not entitled under the circumstances. *Id.* The court noted that "[a]s a practical matter, it would be next to impossible for the state

to regulate the activities of this business without the license requirement." *Id.* Finally, the court observed that when the burdens imposed by local legislation become too great, Congress may legislate to secure uniformity or to protect the national interest as this is a legislative, not a judicial, function. *Id.*

The instant case is analogous to the above regulatory cases. The licensing provision in section 520.32 involves a local concern that the state has the power to regulate, that has not been regulated by Congress, and that does not discriminate against, or in any respect unnecessarily obstruct, interstate commerce. Moreover, the provision is designed to safeguard the people of Florida from deceitful practices and conduct such as that undertaken by Credicorp.

In our view, the Florida Legislature envisioned the licensing of retail installment sellers such as Credicorp. Section 520.36, entitled "Mail order and telephone sales," indicates the legislative intent to include within the licensing provisions retail installment contracts negotiated and entered into by mail or telephone.[8] We are nonetheless constrained to find that the licensing provision, with its flat tax rate, falls within controlling precedent and is therefore unconstitutional. Penalties assessed for a violation of

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[8] Section 520.36 provides:

> Retail installment contracts negotiated and entered into by mail or telephone without personal solicitation by salesmen or other representatives of the seller, when a catalog of the seller or other printed solicitation of business which is distributed and made available generally to the public clearly sets forth the cash price and other terms of sales to be made through such medium, may be made as provided in this section.

chapter 520 must be set aside as must the finding of violation itself. In addition, we certify the following as a question of great public importance:

> MAY FLORIDA IMPOSE A LICENSING REQUIREMENT AND ANNUAL FEE UPON A RETAIL INSTALLMENT SELLER THAT ACTIVELY SOLICITS AND SELLS TO FLORIDA RESIDENTS, BUT REACHES THIS STATE ONLY BY UNITED STATES MAIL AND COMMON CARRIER?

III

RETAIL INSTALLMENT SELLER

Because we have elected to certify this issue as a question of great public importance, we reach Credicorp's additional contention that it may not be regulated under chapter 520 because it does not enter retail installment contracts in Florida.

The licensing requirement of section 520.32(1) is applied to "a retail seller engaging in retail installment transactions." A retail installment transaction means "a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract . . . ." § 520.31(11), Fla. Stat. A " 'retail installment contract' or 'contract' means an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments." § 520.31(10), Fla. Stat. Credicorp argues

that under section 520.31(10), a contract must be entered into in Florida before the state can require a license. In Credicorp's view, orders by Florida consumers are offers that Credicorp must accept, in Texas, before a contract is formed. Credicorp thus denies that any of its contracts are entered into in Florida. The Department obviously takes a contrary view, arguing that a contract of sale developed when the Florida consumer accepted Credicorp's offer to sell, as described in the terms, conditions, and prices in the Credicorp catalog, by submitting the completed and signed order form.

The hearing officer considered these arguments and found "[a] contract of sale can be formed by acceptance of an offer to sell as well as by acceptance of an offer to buy. *Peters v. E.O. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749 (1917)." Recommended Order, at 12. Significantly, however, he also found that "[o]rder forms filled out in Florida by Florida residents are surely among the 'instruments reflecting one or more retail installment transactions' to which Section 520.31(9), *[sic]* Florida Statutes (1991) refers." *Id.* The latter observation is astute and correct. The statutory scheme in question does not merely assume a meaning for "contract" or "retail installment contract." Rather, section 520.31(10) provides a specific definition. That definition of contract as "an instrument or instruments reflecting one or more retail installment transactions entered into in this state" may not strictly accord with commercial usage of the term. Nonetheless, "[w]here the legislature has used particular words to define a term, the courts do not have the authority to redefine it." *Baker v. State*, 636 So. 2d 1342, 1343-1344 (Fla. 1994); *see also Deehl v. Knox*, 414 So. 2d 1089 (Fla. 3d DCA 1982) (statutes should be construed to reflect the common law, unless the legislature clearly indicates

otherwise). Therefore, the Department, as the agency responsible for compliance with the statute, did not abuse its discretion in finding that Credicorp entered into "retail installment contracts" in this state.

IV

THE LOAN BROKER ACT

A

We affirm the Department's ruling that appellants violated provisions of sections 687.141(1) and (3). Although appellants contend that Credicorp is not a loan broker as defined in section 687.14(4)[9], our review of the record and the statute leads to a contrary conclusion. Primarily, appellants contend that Credicorp fits the exception in the loan broker act for any "retail installment sales company . . . licensed by and subject to regulation or supervision of any agency of the United States or this state and . . . acting within the scope of the license." § 687.14(4), Fla. Stat. They urge that because the federal government does not license retail installment companies and because Florida cannot require Credicorp to be licensed in Florida without offending the Commerce Clause, Credicorp falls within the exception for retail installment companies. We disagree. Even if the state cannot require Credicorp to be licensed in Florida, Credicorp may not shelter itself under the definition in section 687.14(4), which excepts only retail installment sales companies licensed by any agency of the United States or Florida.

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[9] *Supra*, note 4.

Interstate concerns such as Credicorp that decide to pursue business in Florida have the choice of either voluntarily submitting to licensure, and thereby falling within the statutory exception, or complying with Florida's regulation that prohibits certain loan brokering acts. Credicorp chose not to voluntarily submit to licensure; therefore, it was required to play by the rules found in chapter 687. The loan broker provisions, sections 687.14-687-148, viewed in light of the cases discussed in section II, *supra*, constitute a permissible exercise of Florida's police power.

We do not view Florida's regulatory scheme as the type of overtly protectionist legislation that has been rightly condemned under the Commerce Clause. An example of such may be found in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980). That case presents a classic example of what the Court concluded to be "parochial legislation" in the sense that it "overtly prevents foreign enterprises from competing in local markets." 100 S. Ct. at 2009. The statute in question in *Lewis*, section 659.141(1), Florida Statutes, prohibited an out-of-state bank holding company from owning or controlling a Florida business that sells investment advisory services to any customer. This statute was apparently passed at the prompting of the Florida Bankers Association and certain individual banks, once they became aware of the prospect of Bankers Trust (BTIM) opening an investment advisory service in Palm Beach County. Under the terms of the statute, Bankers Trust, which principally conducted its business outside Florida, could not acquire, own, or control, directly or indirectly, any Florida bank or trust company where the business of banking or trust business or functions are conducted, or from which such business furnishes investment advisory services. According to the complaint filed in *Lewis*, that

particular statute, when read in conjunction with section 660.10, Florida Statutes, prohibiting any corporation, other than a state chartered bank and trust company or a national banking association located in Florida from performing certain trust or fiduciary functions, prohibiting Bankers Trust from establishing a subsidiary trust company having a national bank charter or a Florida state charter that would engage exclusively in one or more of the functions regulated by section 660.10, Florida Statutes. Thus, the subsidiary, BT Investment Managers, and its prospective parent, Bankers Trust, were completely locked out of the market in Florida. The record in the case also showed that, but for the offending Florida statute, the Federal Reserve Board would have permitted Bankers Trust to engage in the proposed business.

In the present case, retail installment companies that submit to Florida licensure are not subject to the loan broker provisions. Nonetheless, it would require a great stretch to conclude that the statute acts as a barrier specifically to out-of-state firms, or that in-state retail installment sellers have a significant competitive advantage that may not be overcome by interstate businesses. In *Lewis*, the court rightfully concluded that the Florida scheme resulted in "outright prohibition of entry, rather than some intermediate form of regulation (as) the only effective method of protecting against the presumed evils . . . ." 100 S. Ct. at 2019. The statute presently under review regulates, rather than prohibits, loan brokering, and Credicorp raises no argument that it is unable to meet one of the exceptions of section 687.14, only that it may not constitutionally be required to meet one of the exceptions.

Our research has located, and we not distinguish, other cases in which that state legislation at issue had a

clear protectionist motivation. *E.g.*, *National Meat Association v. Deukmejian*, 743 F.2d 656, 657 (9th Cir. 1984) ("the purpose of the law was to promote the California beef industry"); *Miller v. Publicker Industries, Inc.*, 457 So. 2d 1374 (Fla. 1984) (tax preference afforded to domestic gasohol had the practical effect of putting an importer of gasohol out of business as far as the Florida market was concerned); *Delta Airlines, Inc. v. Department of Revenue*, 455 So. 2d 317 (Fla. 1984) (tax credit for Florida based airlines discriminates against interstate commerce because the corporate tax credit provides a direct commercial advantage to Florida based common carriers over non-Florida based carriers).

We are not persuaded that a different result is required by *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), a case relied upon heavily by the dissenting opinion, but not cited at all by Credicorp in any of its briefs. In *Hughes*, a commercial minnow dealer challenged an Oklahoma statute that prohibited transporting or shipping outside the state of Oklahoma for sale minnows seined or procured from waters within Oklahoma. *Hughes* adopted the view that had been previously put forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970):

> Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of

> degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

441 U.S. at 331. The statute involved in *Hughes* went far beyond mere discrimination against interstate commerce; rather, it "overtly block[ed] the flow of interstate commerce at [the] State's borders." 441 U.S. at 337, quoting, *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). In an effort to protect its natural resources, Oklahoma chose the method that most overtly discriminated against interstate commerce. Condemning this "most discriminatory means," the Supreme Court noted the existence of "nondiscriminatory alternatives" adequate to fulfill Oklahoma's legitimate local purpose. 441 U.S. at 338. By using the plural term "alternatives," it appears the Supreme Court will allow a state some discretion to fulfill a legitimate local purpose where it is demonstrated that the state has not elected to utilize the most discriminatory means, which is overt blockage of the flow of interstate commerce.

Under our holding in this case, interstate firms may either voluntarily comply with the Florida state licensing provisions or may comply with the substantive regulatory provisions. This case is, thus, different from those cases in which the out-of-state company found itself, as the result of protectionist legislation, unable, by any means, to obtain the same treatment afforded to domestic companies.

B

Credicorp next argues that it does not fall within the definition of a "loan broker" contained in section 687.14(4). A "loan broker" is:

> [A]ny person, . . . who: (a) . . . arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit; (b) . . . assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature; (c) acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or (d) holds himself out as a loan broker.

§ 687.14(4), Fla. Stat. The Department did not show that Credicorp arranges loans of money. We must thus determine whether Credicorp qualifies as a loan broker under any of the remaining sections of the statutory definition. In particular, a loan broker also includes any person who arranges or attempts to arrange a line of credit or a credit card, or who holds himself out as a loan broker.

Credicorp denies any involvement in lines of credit, as that term is defined in section 687.0303.[10] Appellants

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[10] Section 687.0303 provides:

(1) The term "line of credit," whenever used in this chapter, means an arrangement under which one or more loans or advances of money may be made available to a debtor in one transaction or a series

(continued...)

contend that the statutory definition of line of credit does not include the commercial definition of the phrase, which actually described what Credicorp does: the extension of credit by a retailer for use by the consumer in purchasing that retailer's goods. We do not read the definition so narrowly, nor do we believe such a construction fits the loan broker provisions when read *in pari materia*. As previously noted, the statute excepts from its provisions licensed retail installment sales companies which, like Credicorp, extend only credit for sale of their own merchandise. If such sellers were not otherwise under the regulatory ambit, no need would exist for an exception. In our estimation, Credicorp's installment sales practices are the functional equivalent of advancing money to a debtor. Moreover, we are convinced the Department did not abuse its discretion by finding that Credicorp held itself out as a loan broker by offering a line of credit and a credit card.

The solicitation sent to Florida consumers proclaims, "You have been pre-approved for a *Gold Card* with a $10,000 *line of credit*." The term "credit card" is not defined in chapter 687. *Black's Law Dictionary*, however, defines "credit card" as:

> Any card, plate or other like credit device existing for the purpose of obtaining money, property, labor or services on credit. The

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[10] (...continued)
of related transactions.

(2) The Legislature hereby declares that, as a matter of law, "line of credit," as such term is defined in this section, is deemed to have been included in and governed by the provisions of this chapter as it existed prior to, on and subsequent to July 1, 1979.

> term does not include a note, check, draft, money order or other like negotiable instrument.

Black's Law Dictionary 367 (6th ed. 1990). Credicorp's Gold Card falls within that definition because it exists for the purpose of obtaining property, *i.e.*, merchandise from Credicorp's catalog on credit. Credicorp itself refers to the Gold Card as a credit card in its Members Only Finance Guide: "All credit card purchases carry a finance charge on the amount financed at the Annual Percentage Rate of just 12%." In addition, the order forms Credicorp sends to members includes the following language: "Please enter the following items to be charged to my Gold Credit Card." The Credicorp Rules and Regulations pamphlet also makes repeated reference to use of the Gold Card to purchase merchandise.

The initial solicitation portrays Credicorp as a loan broker by stating without qualification that the targeted consumer has been pre-approved for a "Gold Card with a $10,000 line of credit." Nothing in this mailing informs the consumer that this line of credit has any restrictions or is not really a line of credit as defined in section 687.0303, Florida Statutes. Similarly, in its solicitations, Credicorp fails to mention that the Gold Card is actually a catalog card and cannot be used to purchase services or merchandise from other retailers. We reject Credicorp's argument that it is protected because the line of credit and credit card offers were in truth neither.

V

Finally, the award of penalties was within the permissible range as found in section 687.143 and is supported by competent substantial evidence. The Department therefore acted within its discretion and this court may not overturn the penalty. *See Florida Real Estate Comm'n v. Webb*, 367 So. 2d 201 (Fla. 1978); *Arpavoglou v. Department of Prof. Reg.*, 603 So. 2d 8 (Fla. 1st DCA 1992).

AFFIRMED in part; REVERSED in part; question certified.

BARFIELD, J., CONCURS; ALLEN, J., CONCURS IN PART & DISSENTS IN PART W/WRITTEN OPINION.

ALLEN, J., concurring in part and dissenting in part.

Because there is no substantial nexus for Commerce Clause purposes under the circumstances presented here, I agree with the majority that the finding and penalty with respect to the section 520.32(1), Florida Statutes, license tax must be set aside. I respectfully disagree, however, with the majority's conclusion that the loan broker statutes may be applied to Credicorp without offending the Commerce Clause.

The Commerce Clause grants the congress power "[t]o regulate Commerce . . . among the several States." Although the provision speaks in terms of a power granted to the congress, it has been recognized that it also limits the power of the states to erect barriers to interstate trade. *See e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). This limitation, however, is not absolute. In the absence of conflicting federal legislation, the states may exercise their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected. *See, e.g., Lewis*, 447 U.S. at 36; *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978). Yet, notwithstanding the importance of the state interest involved, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Lewis*, 447 U.S. at 36, *quoting Philadelphia v. New Jersey*, 437 U.S. at 626-627; *see also Hughes*, 441 U.S. at 336; *Hunt v. Washington State Apple Advertising*

Comm'n, 432 U.S. 333, 353, 97 S. Ct. 2434, 53 L. Ed. 2d 383; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). Accordingly, a virtually *per se* rule of invalidity has been applied where outright protectionism is involved. *See, e.g., Lewis*, 447 U.S. at 36; *Philadelphia v. New Jersey*, 437 U.S. at 624. But the prohibition against discrimination is not limited to obviously protectionist legislation. Indeed, discrimination against interstate commerce is impermissible even though the discrimination is not apparent from a mere reading of the legislation, and even though the legislation may not have been enacted for purposes of economic protection. *See Hunt*, 432 U.S. at 352-353. It is enough that the legislation merely discriminates against interstate commerce "in practical effect." *Hughes*, 441 U.S. at 336.

A three-part test has been applied to determine whether a state legislative enactment impermissibly discriminated against interstate commerce. Under that test, we must inquire: (1) whether the challenged statute discriminates against interstate commerce, either on its face or in practical effect; (2) whether the statute serves a legitimate state purpose; and, if so, (3) whether alternative means could promote this purpose as well without discriminating against interstate commerce. *See Hughes*, 441 U.S. at 336; *Pike*, 397 U.S. at 142. Even assuming that there is a legitimate state purpose for including retail installment sellers within the coverage of Florida's loan broker statutes, an analysis under the first and third parts of the foregoing test reveals that the statutes may not be applied to out-of-state retail installment sellers such as Credicorp to the exclusion of licensed in-state retail installment sellers.

As construed by the majority, the loan broker statutes treat out-of-state retail installment sellers not subject to the section 520.32(1) license tax differently from local retail installment sellers who are subject to the 520.32(1) tax. Out-of-state retail installment sellers such as Credicorp are subject to the statutes, but in-state licensed retail installment sellers are exempt. *See* § 687.14(4), Fla. Stat. This unequal application results in harmful discrimination against out-of-state businesses such as Credicorp because it forces them to make a choice: they must either pay the unconstitutional 520.32(1) license tax, or, pursuant to the prohibition of section 687.141(1), Florida Statutes, they must refrain from a practice which is permitted for local, licensed retail installment sellers, the charging of an advance fee for the extension of credit. *See* § 687.141(1), Fla. Stat.

In light of the discriminatory effect of the loan broker statutes, a further inquiry must be made under the test set forth above: whether alternative means could promote the state regulatory purpose as well without discriminating against interstate commerce. The answer seems fairly obvious. The discriminatory effect could easily be removed by making the loan broker statutes applicable to all retail installment sellers. Indeed, if the legislature has determined that a legitimate state purpose is served by making the loan broker statutes applicable to some retail installment sellers, I see no valid reason for failing to make them applicable to all retail installment sellers, and none has been suggested by the appellee.

Because the loan broker statutes, as construed by the majority, discriminate against interstate commerce, and because this discrimination could easily be eliminated, the statutes violate the Commerce Clause to the extent that they

are applied to unlicensed out-of-state retail installment sellers such as Credicorp. Accordingly, I would hold that the loan broker statutes may not be applied to such businesses.

The majority does not suggest that the loan broker statutes are being applied equally to all retail installment sellers, and the majority acknowledges that out-of-state businesses such as Credicorp must make the choice described above. But the majority suggests that such treatment of out-of-state businesses is acceptable for three reasons.

First, the majority says that the loan broker statutes do not violate the Commerce Clause because they do not amount to "overtly protectionist legislation." I agree that the loan broker statutes are not overtly protectionist legislation such as the legislation at issue in the cases cited in the majority opinion. But, under the test enunciated in cases such as *Hughes v. Oklahoma* and *Pike v. Bruce Church*, that is not the end of the inquiry. As explained above, even legislation that is not overtly protectionist violates the Commerce Clause if it has the effect of unnecessarily discriminating against interstate commerce.

Second, the majority says that the loan broker statutes are permissible because they regulate, rather than prohibit, loan brokering. But I know of no exclusion from Commerce Clause scrutiny which must or should be accorded to legislation simply because it fails to absolutely prohibit an economic activity. Indeed, there are numerous examples of state statutes held to be violative of the Commerce Clause even though they did not have the effect of prohibiting economic activity. *See e.g.*, *Hunt*, 437 U.S. at 333; *Pike*, 397 U.S. at 137.

Finally, the majority says that the loan broker statutes meet constitutional scrutiny because Credicorp could pay the section 520.32(1) license tax and be excepted from the loan broker statutes, thereby overcoming any significant competitive advantage that instate retail installment sellers might have as a result of the loan broker statutes. I know of no other authority for the proposition that states may discriminate against interstate commerce through regulatory legislation so long as the burden of that discrimination may be overcome through payments by affected out-of-state businesses into the state's treasury. I doubt that such authority existed before today. And the majority's holding in this regard seems particularly enigmatic in light of the fact that the suggested payment into the state treasury would be for a license tax which, according to the same majority, may not lawfully be assessed against Credicorp because of the prohibition of . . . the Commerce Clause.

I would reverse the order in its entirety.

IN THE

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF FINANCE

ADMINISTRATIVE PROCEEDING 2675-F-12/99

DOAH No. 93-0911

DEPARTMENT OF BANKING AND FINANCE,

Petitioner,

vs.

CREDICORP, INCORPORATED, a TEXAS CORPORATION, JOHN RHEINFRANK, individually and as PRESIDENT of CREDICORP, INC., STEVAN W. BROWN, individually and as VICE PRESIDENT of CREDICORP, INC.,

Respondents.

FINAL ORDER AND NOTICE OF RIGHTS

This matter has come before the undersigned as Head of the Department of Banking and Finance, Division of Finance ("Department"), for the entry of a Final Order in the above referenced proceeding. On October 4, 1993, a Hearing Officer from the Division of Administrative Hearings submitted his Recommended Order in this proceeding, a copy of which is attached hereto as Exhibit "A". On or about October 19, 1993, the Respondents, Credicorp, Incorporated ("Credicorp"), John Rheinfrank and Stevan W. Brown (collectively referred to as "Respondents"), filed their Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "B".

This matter arose when the Department filed an Administrative Complaint charging the Respondents with violations Chapters 516, 520, 687 and 817, Florida Statutes or the rules duly promulgated thereunder.

The Department timely received the Respondents' petitions for hearing. The matter was referred to the Division of Administrative Hearings for the assignment of a hearing officer to conduct a formal hearing. By Notice, a Final Hearing was held on July 23, 1993, in Tallahassee, Florida, before Hearing Officer Robert T. Benton, II. The Hearing Officer's October 4, 1993, Recommended Order recommends that the Department issue a final order finding the Respondents guilty as charged in the Administrative Complaint, directing the Respondents to cease and desist from all unlawful activities pursuant to Chapters 520 and 687, Florida Statutes and imposing an administrative fine in the amount of Three Million Five Hundred Seventy-Eight Thousand Dollars ($3,578,000.00) against Credicorp, Inc., Two Hundred Fifty Thousand Dollars ($250,000.00) against John Rheinfrank and Two Hundred Fifty Thousand Dollars ($250,000.00) against Stevan W. Brown. On October 19,

1993, Respondents timely filed their exceptions to the Recommended Order.

RULINGS ON EXCEPTIONS FILED BY RESPONDENTS

First Exception: The Respondents take exception to the Finding of Fact Number 3 wherein the Hearing Officer describes the solicitation made by Credicorp. Respondents contend that this Finding is incomplete and fails to relate the alleged violations found by the Hearing Officer to the evidence in the record. It appears that the omission Respondents are referring to is that the Hearing Officer fails to find which, if any, of the 640 Florida members received this solicitation. In paragraph 38 of the Conclusions of Law, the Hearing Officer does implicitly find that 640 Florida residents received the deceptive solicitation from Credicorp. Having reviewed the transcript of the hearing, the exhibits and pleadings in this matter, it cannot be determined that there is no competent, substantial evidence to support the Hearing Officer's finding. It is the Hearing Officer's, not the Agency's or the Respondents' function, to evaluate the evidence in reaching ultimate findings of fact. In *Heifetz v. Dept. of Business Regulations*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985), the District Court of Appeal explained the respective roles of hearing officers and state agencies in deciding factual issues as follows:

> The factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. *McDonald v. Dept. Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977). It is

> the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *State Beverage Department v. Ernal. Inc.*, 115 So. 2d 566 (Fla 3rd DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from the finding could be reasonably inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Since there is competent, substantial evidence in the record with which the Hearing Officer reached his Finding of Fact, the Department concurs with it and the Respondents' First Exception is rejected.

Second Exception: The Respondents take exception to Finding of Fact Number 6 regarding the services provided to members by Credicorp. Under the *Heifetz* decision, it cannot be determined that there is no competent, substantial evidence in the record to support the Hearing Officer's finding and therefore the Second Exception is rejected. Also *see Son v. Department of Professional Regulation*, 608, So. 2d 75 (Fla. 3rd DCA 1992).

Third Exception: The Respondents take exception to the Hearing Officer's Finding of Fact Number 9 as being incomplete. Respondents assert that the Hearing Officer fails to distinguish between the statutory definition of "line of credit" contained in Section 687.0303, Florida Statutes, and "a more generic commercial meaning." However, there is no basis for the Respondents' conclusion that the Hearing Officer considered any definition of "line of credit" other than that contained in Section 687.0303, Florida Statutes. Therefore, the Respondents' Third Exception is without merit and therefore rejected.

Fourth Exception: The Respondents take exception to the Hearing Officer's rejection of their proposed Finding of Fact Number 10. Respondents suggest that it was their intent to offer members the opportunity to purchase up to Ten Thousand Dollars ($10,000.00) worth of goods from Credicorp's catalogue on a retail installment basis. The Hearing Officer, however, concluded that it was Credicorp's intent to mislead recipients into believing that no such restrictions applied to this line of credit. As previously stated, it is the Hearing Officer's and not the Agency's or Respondents' function to evaluate the evidence in reaching ultimate findings of fact. *See Heifetz*, supra. Since there is competent, substantial evidence in the record upon which the Hearing Officer reached this Finding of Fact, the Respondents' Fourth Exception is rejected.

Fifth Exception: The Respondents take exception to the Hearing Officer's rejection of their proposed Findings of Fact Numbers 13 and 14. Respondents' proposed Finding of Fact Number 13 maintains that Credicorp used the term "Gold Card" in its invitations to connote a preferred or elevated level of service. In proposed Finding of Fact Number 14 Credicorp contends that in some

instances, other retailers have used the term "Gold Card" without suggesting an affiliation with Visa, MasterCard or American Express credit cards. The Hearing Officer, after evaluation of the evidence before him, found that Credicorp used the term "Gold Card" to mislead recipients of its solicitation into believing that they were being offered a credit card. The Department may not over rule a hearing officer's finding of fact when supported by competent, substantial evidence. Having reviewed the transcript of the hearing, the exhibits and pleadings in this matter, it cannot be determined that there is no competent, substantial evidence to support the Hearing Officer's Findings and rejection of Respondents proposed Findings Numbers 13 and 14. *Son*, supra. Accordingly, Respondents' Fifth Exception is rejected.

Sixth Exception: The Respondents take exception to the Hearing Officer's rejection of their proposed Findings of Fact Numbers 18 and 19, which, in summary, state that Credicorp did not advise customers in obtaining or in attempting to obtain credit cards nor did it arrange or attempt to arrange for its customers a line of credit in accordance with Chapter 687, Florida Statutes. Respondents assert that the Hearing Officer's rejection of these proposed Findings is without merit because nothing in the Findings of Fact support a contrary conclusion. However, in the Findings of Fact Numbers 6 and 9 of the Recommended Order, the Hearing Officer makes his finding that Credicorp does engage in such activity. Since it is the function of the Hearing Officer to evaluate the evidence in reaching the ultimate findings of fact, the Department concurs with the Hearing Officer's rejection of Respondents' proposed Findings of Fact numbers 18 and 19. See *Heifetz*. Therefore, Respondents' Sixth Exception is rejected.

Seventh Exception: The Respondents take exception to the Hearing Officer's rejection of their proposed Finding of Fact Number 20. This proposed Finding details the procedure for placement and acceptance of a catalogue order with Credicorp. This proposed Finding would be used to later conclude that the catalogue orders were accepted in Texas and not in Florida. Although portions of Respondents' proposed Findings of Fact Number 20 are supported by the record, it cannot be determined that there is no competent, substantial evidence to support the Hearing Officer's rejection of this proposed Finding and ultimate Finding that the sales contract comes into existence when the member mails the order and payment. Accordingly, under *Son* and *Heifetz*, Respondents' Seventh Exception is rejected.

Eighth Exception: The Respondents take exception to the Conclusion of Law in paragraphs 22 of the Recommended Order. This paragraph concludes that the retail installment contracts between Credicorp and Florida members were entered into in Florida. Respondents take the position that this conclusion is contrary to Florida law and that the contracts were entered into in Texas. As stated previously, the Hearing Officer weighed the evidence and reach the conclusion based upon competent, substantial evidence. See *Heifetz*, supra. For this reason, the Department concurs with the Hearing Officer's conclusion and rejects the Respondents' Eighth Exception.

Ninth Exception: The Respondents take exception to the Conclusion of Law in paragraph 23 of the Recommended Order which continues from the conclusion in paragraph 22 regarding where the contract is formed. For the reasons articulated in the ruling on Exception 8, the

Department concurs with the Hearing Officer's conclusion and rejects the Respondent's Ninth Exception.

Tenth Exception: The Respondents take exception to the Conclusions of Law in paragraphs 25, 26 and 27 of the Recommended Order which paragraphs conclude that the licensing requirements of Chapter 520, Florida Statutes, do not "unduly burden" nor "discriminate in any way against interstate commerce."

Respondents initially claim that the Hearing Officer miscited and misinterpreted cases which form the basis for his conclusion that Credicorp is subject to the registration requirements of Chapter 520 as a retail installment seller in this state, notwithstanding its lack of physical presence in this state. The Hearing Officer appropriately concluded that the actions of Respondents in this state affect the health and welfare of the citizens of this state, giving this state the power, without running afoul of the Commerce Clause, to regulate Respondents' activities with regard to retail installment contracts entered into with citizens of this state. The *Breard v. City Of Alexandria*[1] and *Bellas Hess*[2] decisions concur with this conclusion. *Bellas Hess* proscribes "unjustifiable" local intrusion in interstate commerce. However, as proposed by Chapter 520, Florida Statutes, and concluded by the Hearing Officer, the acts of Credicorp with regard to retail installment sales form the "substantial nexus" required by the Commerce Clause in order to require Credicorp's compliance with the requirements of Chapter 520. *Quill Corp. v. North Dakota*, 493 U.S. 397, 112 S. Ct. 1904 (1992).

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[1] 341 U.S. 622, 71 S. Ct. 920 (1951).

[2] 386 U.S. 753, 87 S. Ct. 1389 (1967).

Respondents then maintain that Credicorp's activities cannot be in violation of Chapter 520 because Credicorp is exempt from registration with Florida's Secretary of State's Office pursuant to Section 607.1501, Florida Statutes. Even if Credicorp is not required to register pursuant to Section 607.1501, Florida Statutes, Chapter 607 contemplated the occasion wherein certain businesses would be held to a different standard. For this reason, the Legislature included Section 607.0301, which provides that statutes regulating certain types of businesses and corporations shall control when in conflict with Chapter 607. For all of the above reasons, the Department concurs with the conclusions in paragraphs 25, 26 and 27 of the Recommended Order and Respondents' Tenth Exception is rejected.

Eleventh Exception: The Respondents take exception to the Conclusion of Law found in paragraph 28 of the Recommended Order which imposes a fine against Credicorp for each of the 378 retail installment sales made with Florida members in violations of Section 520.32(1), Florida Statutes. In accordance with *Department of Banking and Finance v. Santa Cruz*, 14 FALR 4663, DOAH Case 91-2462, Respondents argument is without merit. Respondents' Eleventh Exception is therefore rejected.

Twelfth Exception: The Respondents take exception to the Conclusion of Law in paragraph 30 of the Recommended Order upon the grounds that Credicorp does not offer a "line of credit" as defined by Section 687.0303, Florida Statutes. For the reasons set forth under the Third Exception hereinabove and *Heifetz*, supra, their Twelfth Exception is rejected.

Thirteenth Exception: The Respondents take exception to the Hearing Officer's conclusions in paragraph 32 and 33 of the Recommended Order. Their reasons are twofold. First, they contend that the documentary evidence which expressly states that Credicorp offers a "credit card" predates the "~~loan~~ broker" provisions of Chapter 687, Florida Statutes. Since Credicorp no longer uses these words in its solicitation, its financing of retail purchases does not constitute a loan under Chapter 687. Surely, if Credicorp did not receive timely payments from its Florida retail installment customers, it would come to a different conclusion.

Second, Respondents contend that the Hearing Officer was forced to "stretch" the law in order to conclude that Credicorp was a loan broker under Chapter 687. They state that "the Legislature could not have intended such an absurd result." However, from the plain language of Section 687.14(4), Florida Statutes, one cannot reasonably conclude otherwise.

After considering Respondents' form over substance arguments, the Hearing Officer correctly and astutely concludes that the actions of Credicorp constitute loan brokering under Section 687.14, Florida Statutes. Competent, substantial evidence supports this conclusion. See *Son*, supra. Therefore, Respondents' Thirteenth Exception is rejected.

Fourteenth Exception: The Respondents take exception to the conclusion in paragraph 35 of the Recommended Order. Respondents challenge the Hearing Officer's conclusion that Credicorp, as a loan broker, charges an "advance fee". The Department concurs with

the Hearing Officer's conclusion and therefore Respondents' Fourteenth Exception is rejected.

Fifteenth Exception: Respondents take exception to the conclusion in paragraphs 36 and 37 of the Recommended Order. Their objection is rejected in part and accepted in part. The Department cannot say that the Hearing Officer's conclusion that the "misleading solicitation . . . would have operated . . as a fraud or deception upon Florida residents" or that the solicitation was "calculated to mislead" is not based upon competent, substantial evidence. *Heifetz*, supra. Additionally, with regard to the Hearing Officer's conclusion that Credicorp appears to be offering "a commonly accepted, widely useful credit card", it is the Hearing Officer's function, not that of the Department, to evaluate the evidence in reaching ultimate findings. *Heifetz*, supra. Therefore, Respondents' Exception to these conclusions is rejected.

To the extent that the Hearing Officer finds that the misleading solicitations operated as a fraud or deception upon some Florida residents, this conclusion is not based upon competent, substantial evidence. *Son*, supra. This portion of Respondents' Exception is therefore accepted. After reviewing the transcript of the hearing, the exhibits and the pleadings in this matter, the Department cannot find any evidence to support this conclusion. *Clark v. Department of Professional Regulation*, 463 So. 2d 328 (Fla. 5th DCA 1985). However, the rejection of this portion of the Conclusion does not affect the ultimate conclusion that Credicorp violated Section 687.141(2), Florida Statutes since buyer reliance is not required. For the reasons stated herein, Respondents' Fifteenth Exception is accepted in part and rejected in part.

Sixteenth Exception: The Respondents take exception to paragraphs 38 and 39 of the Recommended Order upon the grounds that no proof was offered to support the conclusion that 640 Florida residents received any solicitation from Credicorp. Having reviewed the transcript of the hearing, the exhibits and pleadings in this matter, it cannot be determined that there is no competent, substantial evidence to support the Hearing Officer's conclusions. See *Son*, supra. It is the Hearing Officer's, not the Agency's or Respondents' function to evaluate the evidence. *Heifetz*. The Respondents' Sixteenth Exception is therefore rejected.

Seventeenth Exception: Respondents excepts the Hearing Officer's entire recommended penalty. To begin, Respondents state that the Hearing Officer improperly applied the law in order to find violations of Chapter 520, Florida Statutes, by Credicorp. As stated in the ruling on the Eleventh Exception to the Recommended Order, this argument is without merit.

Respondents than assert that the proposed penalty is "grossly excessive." This argument was also addressed in the ruling on Respondents' Eleventh Exception to the Recommended Order. For those same reasons, it is rejected here.

Next, Respondents state that the fine imposed for violations of Chapter 687, Florida Statutes, is not justified because the Department failed to prove that any of the 640 Florida members were "mislead, dissatisfied or otherwise not pleased with the services they had received from Credicorp." This portion of Exception Seventeen is addressed in the ruling on Respondents' Sixteenth Exception

to the Recommended Order and, for those reasons, is rejected.

Finally, Respondents include a "catch all" objection to the penalties imposed by the Hearing Officer which states that he "abused his discretion." The Department cannot reject the penalties recommended by the Hearing Officer without changing the Findings of Fact or Conclusions of Law. *Department of Professional Regulation v. Bernal*, 531 So. 2d 967 (Fla. 1988). For all of the above reasons, Respondents' Seventeenth Exception is rejected.

Final Order

Having ruled on all the Exceptions filed by the Respondents to the Recommended Order, it is hereby ORDERED:

1. Except as modified herein, the Hearing Officer's Preliminary Statement, Findings of Fact and Conclusions of Law in the Recommended Order attached hereto as Exhibit "A" are hereby adopted and incorporated by reference herein as the Preliminary Statement, Findings of Fact and Conclusions of Law of this Final Order.

2. The Respondents Credicorp, Inc., John Rheinfrank and Stevan W. Brown shall forthwith CEASE AND DESIST from all unlawful violations of Chapters 520 and 687, Florida Statutes, and the rules duly promulgated thereunder.

3. The Respondents shall pay administrative fines as follows:

a. Respondent Credicorp, Inc. shall pay an administrative fine in the amount of Three Million Five Hundred Seventy-Eight Thousand Dollars ($3,578,000);

b. Respondent John Rheinfrank shall pay an administrative fine in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00); and

c. Respondent Stevan W. Brown shall pay an administrative fine in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00).

Each of these administrative fines shall be paid by cashier's check or money order made payable to: Regulatory Trust Fund, Department of Banking and Finance, Division of Finance. Payment shall be mailed to:

Department of Banking and Finance
Division of Finance
The Capitol
Tallahassee, Florida 32399-0350

and shall be *received within thirty (30) days of the date of this Final Order.*

DONE and ORDERED this 14th day of January, 1994, in Tallahassee, Leon County, Florida.

/s/ Gerald Lewis
GERALD LEWIS as Comptroller of the State of Florida and Head of the

Department of Banking and Finance

Copies furnished to:

Robert T. Benton, II
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, Florida 32399-1550

Linda G. Dilworth, Director
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202 Blount Street
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Bridget Ryan
Assistant General Counsel
Office of Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399-0350

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE

COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW WITH THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order and Notice of Rights has been furnished by regular U.S. mail to William E. Williams, Esquire, and to Rex D. Ware, Esquire, Huey, Guilday and Tucker, P.A., Attorneys for Respondents, 106 East College Avenue, P.O. Box 1794, Tallahassee, Florida 32301 this 14th day of January, 1994.

/s/ A. Reimbel

IN THE

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CASE NO. 93-0911

DEPARTMENT OF BANKING AND FINANCE,

Petitioner,

vs.

CREDICORP, INCORPORATED, a TEXAS CORPORATION, JOHN RHEINFRANK, individually and as PRESIDENT of CREDICORP, INC., STEVAN W. BROWN, individually and as VICE PRESIDENT of CREDICORP, INC.,

Respondents.

EXHIBIT A

RECOMMENDED ORDER

This matter came on for hearing in Tallahassee, Florida, before Robert T. Benton, II, Hearing Officer of the Division of Administrative Hearings, on July 23, 1993. The Division of Administrative Hearings received the hearing transcript on August 4, 1993, and the parties filed proposed recommended orders on August 16, 1993. The attached appendix addresses the parties' proposed findings of fact.

APPEARANCES

For Petitioner:	Bridget L. Ryan, Esquire Department of Banking & Finance Suite 1302, The Capitol Tallahassee, Florida 32399
For Respondent:	William E. Williams, Esquire Rex Ware, Esquire 106 E. College Avenue Post Office Box 1794 Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether petitioner should impose fines and other administrative sanctions against respondents, and order them "to cease and desist from further violating Florida laws and take appropriate corrective action," for the reasons alleged in the administrative complaint?

PRELIMINARY STATEMENT

By administrative complaint served January 13, 1993, petitioner alleged that respondent Credicorp, Incorporated (Credicorp), a Texas corporation not authorized to do business in Florida and holding no license under Chapter 520, Florida Statutes, had as its president respondent John Rheinfrank and as its vice-president, treasurer and secretary, respondent Stevan W. Brown at all pertinent times; and that the respondents "represented to individuals . . . in Florida, that respondents could, in exchange for payment of money, obtain an extension of credit for a buyer"; that respondents "in expectation of consideration, arrange or attempt to arrange or offer to arrange a credit card or a line of credit for a buyer"; that respondents "assist or advise customers in obtaining, or attempting to obtain a credit card or line of credit"; "(s)pecifically, the Respondents offer customers a 'Gold Card' with a $10,000.00 line of credit at 12% annual interest rate for a $29.95 annual fee . . . [and the] customer is required to pay the $29.95 fee prior to full and complete performance of Respondents' services"; that respondents "deceptively represent in their sales brochure that the customer was receiving a 'Gold Card' which from the sales brochure appears to be a widely accepted, standard credit card. . . [without] inform[ing] the customers of the material fact that the customer was receiving a catalogue card . . . that . . . could be used only to purchase merchandise from a specific catalogue"; that respondents "offer to sell or furnish the goods listed in the catalogue" which "could be paid for by installments" that respondent "through this credit card, would grant credit to a buyer to purchase the

merchandise"; all in violation of Sections 520.32(1), 520.333(1)(a) and 687.141, Florida Statutes.

At hearing, petitioner abandoned certain additional allegations in the administrative complaint, *viz.*, those set out in paragraphs 17, 18, 19, 20, 22, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38, together with any claim that respondents had violated Chapters 516 or 817, Florida Statutes.

Respondents contend that they and the activities alleged in the administrative complaint lie outside Florida's regulatory authority. But respondents' counsel conceded at hearing that, to "the extent that the Department [of Banking and Finance] has jurisdiction over Credi[]corp and Mr. Brown, it has jurisdiction over Mr. Rheinfrank." (T.14)

FINDINGS OF FACT

1. Credicorp, Incorporated (Credicorp) is a Texas corporation whose principal place of business is located in Dallas, Texas. Credicorp is not licensed pursuant to Chapter 520, Florida Statutes, and never has been. Originally incorporated in 1990 under the name FAFCO, Credicorp began mailing solicitations to Florida in November of 1990.

2. John Rheinfrank was president of Credicorp from November of 1990 until October of 1992. T. at 15. Since then, Stevan Brown, who has been corporate secretary at all pertinent times, has served as president. Credicorp has no employees or agents in Florida, and owns

no property in Florida. Credicorp has not registered to do business in Florida and does not collect Florida sales or use taxes.

3. Credicorp mails solicitations, also called invitations, to Florida residents and others. Before the corporate name change, invitations sent to prospects read as follows:

TELEGRAM

APPROVAL NO: [account number specified]
APPROVAL EXPIRATION DATE: [date specified]
[Name and address of targeted individual]

YOU HAVE BEEN PRE-APPROVED FOR A GOLD CARD WITH A $10,000.00 LINE OF CREDIT.

*MAIL YOUR $29.95 ANNUAL FEE BY CHECK OR MONEY ORDER BY (specified date) ALONG WITH THIS SIGNED NOTICE TO ACTIVATE YOUR CREDIT IMMEDIATELY.

FAILURE TO DO SO WILL RESULT IN OUR REEVALUATION OF YOUR ELIGIBILITY. PLEASE RETURN THIS TELEGRAM WITH PAYMENT BY (date specified).

MAKE CHECK OR MONEY ORDER PAYABLE TO FAFCO GOLD CARD.

SINCERELY,

ROBERT J. ARMSTRONG,
NEW ACCOUNTS MANAGER

RESPOND TODAY!

Petitioner's Exhibit No. 19. Robert J. Armstrong, the putative accounts manager, does not exist. T. at 121. Recently invitations have included a 60-day money-back guarantee and a disclaimer in small type disclosing Credicorp's lack of affiliation with a financial institution. Petitioner's Exhibit No. 19.

4. The solicitation arrives in an envelope stamped "DATED MATERIAL: YOUR IMMEDIATE REPLY REQUESTED," and the return address is shown as "CREDIT APPROVAL DEPT." Petitioner's Exhibits Nos. 8 and 21; Admission No. 13.

5. Ordinarily the solicitation contains all the information an individual receives before paying money to Credicorp to secure its services. Respondents offer potential customers residing in Florida a "Gold Card" with "a $10,000 line of credit" at a 12% annual interest rate, in exchange for a $29.95 fee. Petitioner's Exhibits Nos. 19 and 20; Admission 46.

6. The services Credicorp in fact provides to members are offers to sell merchandise, loans for purchasing the merchandise that Credicorp sells, assorted coupons, and hotel and rental car discounts. Petitioner's Exhibits Nos. 15 and 29, line 23. Not one of these services is clearly identified on the initial solicitation sent to

potential members. Petitioner's Exhibit No. 19; T. at 120-121.

7. After the customer submits a pre-approved application and pays the membership fee, Credicorp mails a "fulfillment package." Petitioner's Exhibit No. 15, p. 77, line 22. The customer must pay a $29.95 fee before Credicorp performs any service on the customer's behalf. Petitioner's Exhibit No. 20; Admission No. 47. The fulfillment package contains a letter that states, in part:

> WELCOME TO CREDICORP, YOUR LINE OF CREDIT IS $10,000
>
> HERE IS YOUR CREDICORP MEMBERSHIP CARD!
>
> ACCOUNT #
>
> START USING YOUR CREDICORP MEMBERSHIP AND BONUS COUPONS IMMEDIATELY TO PURCHASE NAME BRAND PRODUCTS FROM OUR HOME VALUES AND GIFT CATALOG. ENCLOSED IS OUR GIFT TO YOU, YOUR PREFERRED MEMBER SAVINGS COUPON BOOKLET WORTH UP TO $1,000.00 IN COUPONS REDEEMABLE IN YOUR AREA. ALSO SEE INFORMATION ENCLOSED ABOUT 50% DISCOUNTS AT THOUSANDS OF LOCATIONS THROUGHOUT THE U.S.

Petitioner's Exhibit No. 6. This letter is the first notice Credicorp gives the "new member" that he or she has joined a catalogue shopping club.

8. The fulfillment package also contains a second letter addressed "Dear New Credicorp Member," a copy of the Credicorp Rules and Regulations, a collection of Home Values and Gifts Bonus Coupons, a booklet of Super Saver coupons, and the Home Values and Gifts catalogue. For the past six months or so, Petitioner's Exhibit No. 16, p. 44, the package has contained an application for a "Privilege Card." Petitioner's Exhibits Nos. 1, 2, 6, and 15, p. 78, 1. 22.

9. A member can purchase merchandise listed in the Home Values and Gifts catalogue by completing order forms contained in the catalogue and mailing them, along with payment, to Credicorp. T. at 108. Credicorp extends members a line of credit of up to $10,000 to purchase this merchandise. T. at 108, 111. The member's "Gold Card" number must be included when ordering products from the catalogue. Petitioner's Exhibit No. 15, p. 83, line 9.

10. A member cannot use the "Gold Card" to purchase goods or services from retail sellers other than Credicorp. T. at 111-114. Members cannot use their "Gold Cards" or their membership to obtain cash from anybody. The Better Business Bureau of Texas received over 34,000 inquiries in 1992 regarding Credicorp's activities. T. at 122-123.

11. Credicorp receives a mark-up on the merchandise it sells members. Petitioner's Exhibit No. 16, p. 60, line 5. Members who purchase merchandise on credit must initially submit a specified down payment with the order. Petitioner's Exhibits Nos. 1, 2 and 14. Two prices are available to a Credicorp member, a cash price and a "credit price," which reflects a 12% financing fee. Petitioner's Exhibits Nos. 1, 2, 14. Merchandise purchased on credit arrives with an installment coupon book for each item ordered. Petitioner's Exhibit No. 6, Credicorp Rules and Regulations p. 2.

12. The Credicorp Rules and Regulations, the order forms contained in the catalogue, and all other materials Credicorp provides members make no mention of any contingency once the member completes, signs and sends in a form order for merchandise with the amount of money required. Petitioner's Exhibits Nos. 1, 2, 6, 12, 14, 17. Many Florida residents complete and sign these order forms in Florida. Petitioner's Exhibit No. 17. Credicorp has received at least 378 form orders for merchandise from Florida residents. *Id.*

13. Approximately 1,600,000 individuals have submitted to Credicorp membership applications, each accompanied by $29.95. New members' names and addresses are entered into a computer data base and "batch edit sheets," each listing 100 names of new members, are printed. Petitioner's Exhibits Nos. 4 and 5; Petitioner's Exhibit No. 15, page 73, line 1; T. at 47.

14. Sample batch edit sheets obtained from Credicorp by the Department listed the names of 640 Florida residents who had sent a membership application form and $29.95 to Credicorp to obtain membership. Petitioner's Exhibit Nos. 4, 5, 18. On a single day, June 24, 1992, money and membership application forms from 243 residents of Florida reached Credicorp. Petitioner's Exhibit No. 18.

CONCLUSIONS OF LAW

15. Since the Department of Banking and Finance referred respondent's hearing request to the Division of Administrative Hearings, in accordance with Section 120.57(1)(b)3, Florida Statutes (1992 Supp.), "the division has jurisdiction over the formal proceeding." Section 120.57(1)(b)3, Florida Statutes (1992 Supp.).

16. Section 520.995, Florida Statutes (1991) authorizes the Department to impose an administrative fine against any person violating Chapter 520, in an amount "not to exceed $1,000 for each such act." Section 520.995(2)(f), Florida Statutes (1991).

17. While the administrative complaint pleaded Section 520.331, Florida Statutes (1991), since repealed, rather than Section 520.995, the pertinent language in Section 520.331 is identical to the language that remains in effect in Section 520.995, Florida Statutes (1991). The discrepancy in citation is, therefore, without legal significance. *See Scharrer v. Department of Professional*

Regulation, 536 So.2d 320 (Fla. 3rd DCA 1988) (reh. den. 1989); *Nelson Richard Advertising v. Department of Transportation*, 513 So.2d 181 (Fla. 1st DCA 1987).

18. Section 687.143, Florida Statutes (1991), authorizes the Department to impose an administrative fine against any person violating Chapter 687, in an amount not to exceed $5,000 for each violation, and to order an offending loan broker and its principals to cease and desist violating Chapter 687, if it is proven that violations have occurred.

Burden on Agency

19. Strict procedural protections apply in disciplinary cases, and, for purposes of deciding the present case, the prosecuting agency's burden is assumed to be to prove its case clearly and convincingly. *See Ferris vs. Turlington*, 510 So.2d 292 (Fla. 1987) *Pic N' Save Central Florida. Inc. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, No. 91-329 (Fla. 1st DCA; May 28, 1992), 17 FLW D1379. See *Addington vs. Texas*, 441 U.S. 426 (1979); *Ferris vs. Austin*, 487 So.2d 1163 (Fla. 5th DCA 1986); *Anheuser-Busch, Inc. vs. Department of Business Regulation*, 393 So.2d 1177 (Fla. 1st DCA 1981); *Walker vs. State Board of Optometry*, 322 So.2d 612 (Fla. 3rd DCA 1975); *Reid vs. Florida Real Estate Commission*, 188 So.2d 846, 851 (Fla. 2nd DCA 1966); *Department of Banking and Finance v. Santa Cruz et al.*, 14 FALR 4663 at 4681, DOAH Case No. 91-2462.

Retail Installment Transactions

20. Section 520.32(1), Florida Statutes (1991) provides that a "person may not engage in or transact the business of a retail seller engaging in retail installment transactions. . . without a license . . . . ." "Retail installment transaction" is defined as a "contract to sell or furnish or the sale of or the furnishing of goods . . . pursuant to a retail installment contract," Section 520.31(10), Florida Statutes (1991), which in turn is defined as "an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments." Section 520.31(9), Florida Statutes (1991).

21. The statute is clearly intended to reach mail order sales, "contracts negotiated and entered into by mail or telephone." Section 520.36, Florida Statutes (1991). But respondents maintain that the statute does not require Credicorp to obtain a Florida license as a retail installment seller because, it is said, the instruments reflecting its transactions with Florida residents do not evidence "retail installment contracts entered in this state." Alternatively, respondents argue that the statute cannot constitutionally be construed to require such licensure because Credicorp has no employees or other agents in Florida nor any property here.

22. Respondents contend that all their retail installment contracts with Florida residents are entered into not in Florida, when a buyer mails payment and an order

form here, but in Texas, when Credicorp ships merchandise or otherwise accepts orders there. They cite Section 672.206, Florida Statutes (1991), entitled "Offer and acceptance in formation of contract," which provides:

> (1) Unless otherwise unambiguously indicated by the language or circumstances:
>
> (a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
>
> (b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

No writing nor any surrounding circumstance unambiguously indicates that the catalogue, which sets out unequivocal terms by which Credicorp proposes to be bound, does not constitute an offer to make a contract, an offer inviting a member's acceptance by mailing payment and a completed order form in Florida. A contract of sale can be formed by acceptance of an offer to sell as well as by acceptance of an offer to buy. *Peters v. E. O. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749 (1917).

23. Indeed a "contract for sale of goods may be made in any manner sufficient to show agreement,

including conduct by both parties which recognizes the existence of such a contract." Section 672.204(1), Florida Statutes (1991). An order does not require acceptance under Section 672.206(l)(b), Florida Statutes (1991), when it is itself acceptance under Section 672.206(1) (a), Florida Statutes (1991). Parol evidence at hearing as to corporate intent cannot alter this fact. Order forms filled out in Florida by Florida residents are surely among the "instruments reflecting one or more retail installment transactions" to which Section 520.31(9), Florida Statutes (1991) refers. *Cf. Skurnick v. Ainsworth*, 591 So.2d 904 (Fla. 1991).

Giving Statute Its Intended Effect Raises No Substantial Constitutional Question

24. Such a construction is fully consonant with due process requirements that Credicorp have sufficient "minimum contacts" with Florida to enable Florida to require licensure. As was pointed out in Quill Corp. v. North Dakota, 493 U.S. 397, 112 S.Ct. 1904 (1992), an

> out-of-state direct marketer derives numerous commercial benefits from the State in which it does business. These advantages include laws establishing sound local banking institutions . . . means of waste disposal from garbage generated by mail order solicitations; and creation and enforcement of consumer protection laws, which protect buyers and sellers alike, . . . the latter by creating a climate of consumer confidence

> that inures to the benefit of reputable dealers in mail order transactions.

112 S.Ct. at 1920 (White, J., dissenting.) In dollar volume, Credicorp's dealings with Floridians in a single day exceeded those found sufficient, although occurring over the course of an entire year, to support service on an out-of-state manufacturer in *Eder Instrument Co. v. Allen*, 253 So.2d 902 (Fla. 3d DCA 1971). *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945); and, *e.g.*, *Savet v. Interstate Blood Bank, Inc.*, 245 So.2d 142 (Fla. 3d DCA 1971).

25. Florida's requirement that all retail installment sellers doing business in Florida be licensed does not unduly burden interstate commerce and does not discriminate in any way against interstate commerce. *See Breard v. Alexandria*, 341 U.S. 622 (1951). "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940). That the licensing requirement may be said to fall directly on interstate (as well as intrastate) commerce has no constitutional significance. See *Complete Auto Transit, Inc. v. Brady*, 400 U.S. 274 (1977).

26. Nor does the interstate commerce clause create a "rigid territorial limitation on the power of the States in our federal system to safeguard the health and welfare of their citizens." *Bigelow v. Virginia* 95 S.Ct. 2222, 2239 (1975) (Rehnquist, J., dissenting.)

"Irrespective of a State's power to regulate extraterritorial commercial transactions in which its citizens participate it retains an independent power to regulate the business of commercial solicitation and advertising within its borders." *Id.* One purpose Chapter 520 evinces is to protect Florida consumers from misleading solicitations.

27. In *Head v. New Mexico Board*, 374 U.S. 424 (1963), a New Mexico law forbidding certain radio advertising that would have reached not only New Mexicans but Texans, as well, was upheld against a challenge by an optometrist practicing in Texas. *Cf. Skiriotes v. Florida*, 313 U.S. 69, 74-5 (1941); *Strassheim v. Daily*, 221 U.S. 280 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect . . .." At 285.)

28. In short, Section 520.32(l), Florida Statutes (1991), construed in keeping with "common sense," *Skurnich v. Ainsworth*, supra at 906 (internal citation omitted), and the Constitution of the United States alike, renders each of the 378 sales of merchandise petitioner has proven a violation of Chapter 520 for which petitioner is authorized to levy 378 administrative fines not to exceed 51,000 each. *Department of Banking and Finance v. Santa Cruz*, 14 FALR 4663, 4681, DOAH Case No. 91-2462.

Unlicensed Installment Retailers Deemed Loan Brokers

29. Section 687.141, Florida Statutes (1991), entitled "Loan brokers; prohibited acts," provides that "[n]o loan broker shall:

> (1) Assess or collect an advance fee from a borrower to provide services as a loan broker.
>
> (2) Make or use any false or misleading representation, or omit any material fact in the offer or sale of the services of a loan broker or engage, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a loan broker, notwithstanding the absence of reliance by the buyer.
>
> (3) Make or use any false or deceptive representation in its business dealings or to the department or conceal a material fact from the department.

Initially respondents raise the question whether they or any of them fall within the statutory definition of "loan broker," without, however, urging any impediment predicated on the interstate commerce clause or other constitutional provisions.

30. The statutory definition is set out in Section 687.14, Florida Statutes (1991), which provides:

> (4) *'Loan Broker' means any person*, except any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, securities broker-dealer, real estate broker or salesperson, attorney, federal Housing Administration or Veteran's Administration approved lender, credit card company, installment loan licensee, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license; and also excepting subsidiaries of licensed or chartered consumer finance companies, banks, or savings and loan associations; *who*
>
> (a) *For or in expectation of consideration* arranges or attempts to arrange or *offers to fund* a loan of money, *a credit card, or a line of credit*;
>
> (b) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit, or

> related guarantee, enhancement, or collateral of any kind or nature;
>
> (c) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers; *or;*
>
> (d) *Holds himself out as a loan broker.*
>
> (5) 'Principal' means any officer, director, partner, joint venturer, branch manager, or other person with similar managerial or supervisory responsibilities for a loan broker.

(Emphasis supplied.) Credicorp is a loan broker within the meaning of the statute, if for no other reason, because Credicorp holds itself out as offering a line of credit.

31. The solicitations Credicorp sent to potential members offered a "Gold Card" with a "$10,000 line of credit." Petitioner's Exhibits Nos. 19 and 20. The "Members Only Finance Guide" states, "All credit card purchases carry a finance charge on the amount financed at the Annual Percentage Rate (APR) of just 12%." Petitioner's Exhibit No. 20, number 86, page 56. The order forms Credicorp sent to members state, "Please enter the following items to be charged to my Gold Credit Card." Petitioner's Exhibit No. 17.

32. While Chapter 687 does not define "credit card," and respondents showed that the member's number, not the card itself, was used to process installment sales, petitioner proved that Credicorp held itself out as a "loan broker." Section 687.14(4), Florida Statutes (1991). Credicorp also meets the definition of a loan broker because it offers to make loans to members who make "credit purchases" of merchandise listed in the catalogue; and does in fact make loans in financing "credit purchases."

33. Credicorp has operated as a retail installment sales company, but without benefit of Florida or federal licensure. There was no suggestion that it was "licensed by and subject to regulation or supervision of any agency of the United States," Section 687.14(4), Florida Statutes (1991), and it affirmatively appeared that Credicorp has no Florida license as a retail installment sales company. Without one or the other, Credicorp falls within the statutory definition of a loan broker.

34. Because Credicorp is a loan broker, under Section 687.14(5), Florida Statutes (1991), Stevan Brown is and John Rheinfrank was a principal of a loan broker, by virtue of being and having been officers of Credicorp.

35. As a loan broker, Credicorp is statutorily forbidden to "[a]ssess or collect an advance fee from a borrower to provide services as a loan broker." Section 687.141(l), Florida Statutes (1991). An "advance fee" is defined in Section 687.14(l), Florida Statutes (1991) to mean "any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker." Credicorp

collected advance fees of $29.95 from each buyer as a condition of extending credit. "Services as a loan broker" include an unlicensed retailer's extending credit.

Material Omissions

36. Credicorp violated Section 687.141(2), Florida Statutes (1991) by systematically mailing large numbers of misleading solicitations which operated, in some instances, and would have operated in others as fraud or deception upon Florida residents. Credicorp's initial solicitations offer "the services of a loan broker," within the meaning of the statute, and are calculated to mislead. They appear to offer a commonly accepted, widely useful credit card.

37. The solicitations completely omit any mention of the quaint group of services the unwitting consumer is in fact destined to receive. There is no hint of coupons or catalogues, which might alert the solicitee that Credicorp was not really offering what is usually meant by a "Gold Card" with a "$10,000 line of credit." The solicitations say nothing of the drastic restriction limiting use of the line of credit actually available. This deceptive omission of a material fact runs afoul of Section 687.141(2), Florida Statutes (1991).

38. Credicorp's violations are not merely technical ones. The company should be fined $5,000 for each of the 640 deceptive solicitations which elicited payments from Florida residents, for a total of $3,200,000, on account of violations of Chapter 687, Florida Statutes.

In addition, the Department should enter an order requiring that Credicorp cease and desist from all activity in violation of Chapter 687, Florida Statutes.

39. Each Principal of a loan broker may be sanctioned for the actions of the loan broker. The Department should also order John Rheinfrank and Stevan Brown to cease and desist from all activities in violation of Chapter 687, Florida Statutes, and levy an administrative fine against each in the amount of $250,000 for causing or allowing Credicorp to operate in violation of Chapter 687, Florida Statutes.

RECOMMENDATION

It is, accordingly,

RECOMMENDED:

1. That petitioner order respondents Credicorp, John Rheinfrank and Stevan Brown to cease and desist violating Chapter 687, Florida Statutes.

2. That petitioner levy an administrative fine against Credicorp in the amount of three million five hundred seventy-eight thousand dollars ($3,578,000) to be paid within thirty (30) days of entry of the final order.

3. That petitioner levy an administrative fine against respondent John Rheinfrank in the amount of two

hundred fifty thousand dollars ($250,000) to be paid within thirty (30) days of entry of the final order.

4. That petitioner levy an administrative fine against respondent Stevan Brown in the amount of two hundred fifty thousand dollars ($250,000) to be paid within thirty (30 days of entry of the final order.

With respect to respondent's proposed finding of fact No. 12, Credicorp lends money to finance merchandise it sells on credit.

With respect to respondent's proposed findings of fact Nos. 13 and 14, it is clear from all the circumstances that Credicorp used the term "Gold Card" to mislead recipients of its solicitations into believing they were being offered a credit card.

With respect to respondent's proposed finding of fact No. 15, the evidence did not show that the "Credicorp Gold Card is useful to members as a reminder of their membership."

With respect to respondent's proposed finding of fact No. 17, the word card does appear.

With respect to respondent's proposed findings of fact Nos. 18 and 19, Credicorp so held itself out.

With respect to respondent's proposed finding of fact No. 20, the sales contract comes into existence when the member mails the order and payment.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

IN THE

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF FINANCE

ADMINISTRATIVE PROCEEDING 2675-FI-12/92

DOAH No. 93-0911

DEPARTMENT OF BANKING AND FINANCE,

Petitioner,

v.

CREDICORP, INCORPORATED, a TEXAS CORPORATION, JOHN RHEINFRANK, individually and as PRESIDENT of CREDICORP, INC., STEVAN W. BROWN, individually and as VICE PRESIDENT of CREDICORP, INC.,

Respondents,

EXHIBIT B

RESPONDENTS' EXCEPTIONS TO RECOMMENDED ORDER

Respondents, Credicorp, Inc., John Rheinfrank and Stevan W. Brown ("Respondents", or where appropriate, generically referred to as "Credicorp"), by and through their undersigned counsel, pursuant to Section 120.57(1)(b)9, Florida Statutes, (Supp. 1992) and Rule 3.7012(l), Florida Administrative Code, file their exceptions to the Hearing Officer's Recommended Order entered in the above-styled case on October 4, 1993.

BACKGROUND

On or about January 13, 1993, the State of Florida, Department of Banking and Finance ("Department") filed an Administrative Complaint alleging that Respondents had violated various provisions of Chapters 516, 520, 687 and 817, Florida Statutes.

Respondents timely filed a response to the Administrative Complaint and requested a formal hearing. A final hearing was held before a Hearing Officer from the Division of Administrative Hearings on July 23, 1993, in Tallahassee, Florida.

At final hearing, the Department withdrew its allegations that Credicorp was a credit service organization and had violated Chapters 516 and 817, Florida Statutes. Specifically, the Department dismissed paragraphs 17-20 of

the Statement of Facts, and paragraphs 22, 25 and 28-38 of the Conclusions of Law in the Administrative Complaint.

At the final hearing, the Department called only one witness, Lynn Chang, a financial administrator employed by the Department. The Department offered 26 exhibits, which were received into evidence. Respondents called one witness, Stevan W. Brown, the current President of Credicorp, and offered five exhibits which were received into evidence.

A transcript of the final hearing was filed on August 4, 1993. Both Respondents and the Department filed timely proposed recommended orders. The Hearing Officer entered his Recommended Order on October 4, 1993.

FIRST EXCEPTION

Respondents except to Finding of Fact Number 3 in that it is incomplete and fails to relate the alleged violations found by the Hearing Officer to evidence in the record. In addition to the language found by the Hearing Officer to be contained in Credicorp's customer invitation, the evidence also established that the invitation advised potential customers that Credicorp ". . . provides credit services only to its members and is not affiliated with any financial institution, bank or other entity." (Petitioners Exhibit 3, 19). Further, the Nearing Officer fails to find which, if any, of the 640 Credicorp members living in Florida received an invitation containing the language which he

deems "misleading" as a matter of law. (Recommended Order, paragraph 36).

SECOND EXCEPTION

Respondents except to the Hearing Officer's finding in paragraph 6 of the Recommended Order that Credicorp provides ". . . loans for purchasing the merchandise that Credicorp sells. . .." There is absolutely no evidence in the record to support such a conclusion. Only two witnesses were called to testify in this proceeding. The president of Credicorp testified that the company does not lend or attempt to lend money to its members (T. 112). The Department's only witness likewise conceded that she knew of no facts to establish that Credicorp lends money or advances funds to its members (T. 60-61). The evidence cited by the Hearing Officer to support his conclusion (Petitioners' Exhibit 15, p. 29, line 23) contains no facts to show the existence of any "loans" to Credicorp customers. In short, no such evidence exists, and, in fact, all evidence of record is to the contrary.

THIRD EXCEPTION

Respondents except to the Hearing Officer's finding in paragraph 9 of the Recommended Order that Credicorp ". . . extends members a line of credit of up to $10,000 . . ." in that the finding is incomplete. The Hearing Officer fails to distinguish between the statutory definition of "line of credit" contained in Section 687.0303, Florida Statutes

and its more generic commercial meaning. To constitute a violation of Chapter 687, a "line of credit" must constitute ". . . an arrangement under which one or more loans or advances of money are made. . . ." Section 687.0303, Florida Statutes. As indicated above, there is no evidence in the record of this proceeding that Credicorp lends or advances money to its members. As a result, the "line of credit" offered by Credicorp does not meet the regulatory definition of that term contained in Chapter 687, Florida Statutes and is therefore outside the jurisdiction of the Department.

FOURTH EXCEPTION

Respondents except to the Hearing Officer's rejection of their proposed Finding of Fact Number 10. That proposed finding was as follows:

> It was Credicorp's intent that the language "$10,000 line of credit" contained in its invitation mean that a member can purchase up to $10,000 worth of goods from its catalogue on a retail installment basis. (T. 111).

In the Appendix to the Recommended Order, at page 20, the Hearing Officer indicates that ". . . it was Credicorp's intent to mislead recipients into believing that there was no such restriction . . ."

The Hearing Officer fails to include in the Findings of Fact section of his Recommended Order any facts to support such a conclusion. Further, there are no facts in the record to establish that Credicorp intended to mislead its members.

FIFTH EXCEPTION

Respondents except to the Hearing Officer's rejection of their proposed Findings of Fact Numbers 13 and 14. Those proposed findings were as follows:

> 13. Credicorp uses the term "Gold Card" on its invitations because that phrase is widely recognized to mean that a member is getting a preferred or elevated level of service. (T. 112).
>
> 14. There are retail sellers, other than Credicorp, which also use the "Gold Card" nomenclature, unconnected with a Visa, Master Card or American Express credit card. (T. 112-113).

In the Appendix to the Recommended Order, at page 21, the Hearing Officer indicates that ". . . Credicorp used the term 'Gold Card' to mislead recipients of its solicitations into believing they were being offered a credit card."

The Hearing Officer fails to include in the Findings of Fact section of the Recommended Order any facts to

support such a conclusion. Further, the only facts of record relating to this issue are to the contrary. (T. 112-113).

SIXTH EXCEPTION

Respondents except to the Hearing Officer's rejection of their proposed Findings of Fact Numbers 18 and 19. Those proposed findings were as follows:

> 18. Credicorp does not assist or advise its customers in obtaining or attempting to obtain a credit card. (T. 66).
>
> 19. Credicorp does not arrange or attempt to arrange for its customers a "line of credit," as defined by Chapter 687, Florida Statutes. (T. 67-68).

In the Appendix to the Recommended Order, at page 21, in ruling on the above-quoted proposed Findings of Fact, the Hearing Officer indicates only that ". . . Credicorp so held itself out. . . ." However, the Hearing Officer includes nothing in the Findings of Fact section of his Recommended Order to support such a conclusion. Indeed, the Department's only witness specifically conceded that she knew of no facts establishing that Credicorp assisted or advised its customers in obtaining either a credit card or a line of credit. (T. 66, 67-68). The Respondents' proposed findings are fully supported by the record, and the Hearing Officer erred in rejecting them.

SEVENTH EXCEPTION

Respondents except to the Hearing Officer's rejection of their proposed Finding of Fact Number 20. The proposed finding was as follows:

> 20. When a Credicorp member desires to make a purchase from the Credicorp catalogue, he or she fills out a purchase order form, includes the sum necessary for shipping and handling (and any other amount up to the total purchase price) and mails the order to Credicorp in Dallas, Texas. Once received, Credicorp reviews the order request, verifies current membership, checks the status of the member's account, checks the availability of the items ordered, and decides whether to accept the order. If accepted, Credicorp packages and ships the goods from Dallas, Texas, to the member via common carrier. (T. 115-116).

In the Appendix to the Recommended Order, the Hearing Officer indicates in response to the above-quoted proposed finding only that ". . . the sales contract comes into existence when the member mails the order and payment." Respondent's proposed Finding of Fact Number 20 fully explains the procedure by which orders are placed and filled, is fully supported by evidence of record, and thus should not have been rejected by the Hearing Officer.

Respondents also except to the Conclusions of Law of the Hearing Officer, as follows:

EIGHTH EXCEPTION

1. Respondents except to the conclusions in paragraph 22 of the Recommended Order. In citing the alternative positions stated in Section 672.206, Florida Statutes, the Hearing Officer automatically assumes that subsection (a), rather than (b), applies to the facts of this case. He has clearly misread the statute for the purpose of attempting to find that the contracts were entered into in Florida, without explanation or citation to any law which would justify his selection.

First, subsection (b) explicitly identifies transactions, such as Credicorp has with its members, i.e. "an offer to buy goods," while subsection (a) speaks only to a generic "contract."

Second, the Hearing Officer clearly ignores the facts when he concludes that "no writing nor any surrounding circumstance unambiguously" indicates which option should apply. The evidence of "surrounding circumstances" was undisputed that this case involved the buying and selling of goods, and that there were acts which were required to occur in Texas, before the contract became complete.

NINTH EXCEPTION

Respondents also except to the conclusions in paragraph 23. With absolutely no citation to any decisional law, the Hearing Officer erroneously concludes that "an order does not require acceptance under Section 672.206(l)(b), Florida Statutes (1991)), when it is itself acceptance under Section 672.206(1) (a), Florida Statutes (1991)." This conclusion is clearly erroneous in light of the specific language of each of those subsections. Subsection (b), dealing with goods as we have here, unambiguously delineates what is considered an offer and an acceptance, and the facts as reflected in the record herein, unambiguously indicate that they meet subsection (b). The contracts involved herein were not complete until they were *accepted* by Credicorp in Texas.

The Hearing Officer, in his misguided attempt to require something of Credicorp that the law does not require, also erroneously concludes that the parties intent is not relevant. He apparently does so in an attempt to ignore the *only* evidence of intent in the record, which was Credicorp's testimony that it must complete certain tasks in Texas, after an order is placed, to complete the transaction.

Finally, the Hearing Officer cites the case of *Skurnick v. Ainsworth*, 591 So. 2d 904 (Fla. 1991) as alleged authority for the inappropriate legal conclusion detailed above. However, the *Skurnich* decision is, in reality, authority for a finding that Section 520.32, Florida Statutes, was *not* intended to cover transactions like those involved in this case.

In *Skurnick*, the applicable statute, Section 517.12, Florida Statutes, specifically stated that, unless registered, no one could:

> . . . sell securities *in this state* to persons *in this state* from offices *outside of this state*, by mail or otherwise. (emphasis added)

And, based upon that specific language, the *Skurnick* Court found that the out-of-state dealer in that case was regulated. However, in this case, Section 520.32, Florida Statutes, contains no such language specifically indicating that it covers out-of-state retailers, such as Credicorp. In other words, the Hearing Officer has impermissibly attempted to extend the reach of Chapter 520.

Although Respondents cannot except specifically to paragraph 24 of the Recommended Order because it correctly states the law, Credicorp would point out that the conclusions therein are irrelevant as they appear to be related to a due process argument, rather than the Commerce Clause arguments asserted by Credicorp.

TENTH EXCEPTION

Respondents do, however, specifically except to the Hearing Officer's conclusions in paragraphs 25, 26 and 27 of the Recommended Order, dealing with the Commerce Clause. In each of these paragraphs, the Hearing Officer has either miscited authority for his inappropriate

conclusions or has misinterpreted the holdings of the cited cases.

In paragraph 25, the citation is to *Breard v. Alexandria*, 341 U.S. 622 (1951), a case dealing with a *local* ordinance regulating *door-to-door salesmen*. It is cited for the proposition that Florida's licensing scheme does not unduly burden interstate commerce. However, a close reading of the *Breard* case indicates that it relates to persons actually *present within the jurisdiction*, is specific to its own facts, and, in fact, supports Credicorp's position as regards interstate commerce. In comparing and contrasting its limited facts, the Court notes:

> While taxation and licensing of hawking or peddling, defined as selling and delivering in the state, has long been thought to show no violation of the Commerce Clause, *solicitation of orders with subsequent interstate shipment has been immune from such an exaction*. (emphasis added) 341 U.S. at 638.

Further, at page 633, in footnote 15, the Court cites to other cases which have held that taxes and/or a license fee upon interstate commerce is unconstitutional.

The Hearing Officer then goes on to cite a tax case, *Complete Auto Transit, Inc. v. Brady*, 400 U.S. 274 (1977), for the proposition that licensing requirements may impact interstate commerce. However, the *Complete Auto* case does not stand for such a proposition. It merely

found, under the specific facts, that a taxing statute was not violative of the Constitution. The Hearing Officer fails to recognize, in the Commerce Clause portion of his conclusions, the *Quill Corp. v. North Dakota*, 493 U.S. 397 (1992) decision which explains *Complete Auto* and is the latest Supreme Court ruling in this area. The Hearing Officer fails to recognize that portion of the *Quill* decision clearly delineating when licensing or taxing statutes as applied to out-of-state companies violate the Commerce Clause. The Hearing Officer mistakenly equates, contrary to the *Quill* Court's findings, the nexus requirements imposed by the Due Process Clause to be identical to those imposed by the Commerce Clause. Rather, after distinguishing the standards, the Court found that the "bright line" test of its earlier *Bellas Hess* decision was good law and that it created a "safe harbor" for "vendors whose only connection with customers in the State is by common carrier or the United States mail." 112 S.Ct. at 1914. As the Department should find here, the *Quill* Court found that the company with *no* physical presence in the regulating state, could not be constitutionally regulated within the bounds of the Commerce Clause.

Further, the Hearing Officer, in paragraphs 26 and 27, cites to the *dissenting* opinion in *Bigelow v. Virginia*, 95 S.Ct. 2222 (1975), a case dealing with First Amendment rights of advertising and to two other case decided over 30 years ago.

Finally, regarding whether Credicorp is required to register as a retail installment seller in Florida, the Hearing Officer ignored, and failed to rule on Credicorp's proposed

conclusion no. 19. Therein, Credicorp pointed out that under Section 607.1501, Florida Statues, that Credicorp was not and is not required to register with the Secretary of State's office. In that statute, it is clear that the Legislature does contemplate instances where retail installment contracts, even though solicited through the mail, can require acceptance outside of this State, and that in such instances, companies such as Credicorp, are not required to be "registered" with the State.

ELEVENTH EXCEPTION

Respondents except to paragraph 28 of the Recommended Order wherein the Hearing Officer recommends a monetary penalty. Ignoring the fact that the Complaint in this *only* case alleges *one* violation of Chapter 520, specifically that Credicorp failed to register as a Florida retail installment seller, the Hearing Officer improperly finds 378 violations. This is absolutely impermissible. The Department cannot impose a penalty based on violations which have not been alleged in the Complaint, and the Complaint herein cannot be said to allege that Credicorp failed to register 378 times. Even if the Hearing Officer were correct in his other conclusions, the highest allowable penalty would be $1,000.

The Hearing Officer has, at best, misapplied the law in this case, and at worst, has intentionally ignored the true state of the law in an attempt to find that Credicorp has violated some law. This is evidenced regarding his proposed penalty under Chapter 520, as well as his

mistaken analysis in the "loan broker" area discussed below.

TWELFTH EXCEPTION

Respondents except to paragraph 30 of the Recommended Order, wherein the Hearing Officer, without citation to any law, mistakenly finds that Credicorp holds itself out as a loan broker because it offers a "line of credit." It is here that the Hearing Officer begins his erroneous analysis of the provisions of Chapter 687.

As stated in Respondents' Proposed Recommended Order, "line of credit" is specifically defined by statute, and the Department's own representative testified that what Credicorp offers *does not meet the statutory definition* of line of credit. The facts on this issue could not have been more undisputed. If what Credicorp offers does not equate to the statutory definition of line of credit, then legally it is not offering a line of credit.

THIRTEENTH EXCEPTION

Respondents also except to paragraphs 32 and 33, wherein the Hearing Officer continues his erroneous analysis. Here he finds that Credicorp holds itself out as a loan broker because of material included in its *old* catalogues. (See Exhibit No. - wherein it is clear that the only order forms which mention the term "credit card" predate the effective date of the "loan broker" statute). The

Hearing Officer chooses to ignore the solicitations themselves, which *nowhere*, according to the record evidence, contain the words "credit card." For his own purposes, the Hearing Officer now chooses to use the publication which the customer receives where it is clear that no credit card is being offered, apparently so he can selectively focus on certain language. If the solicitations do not offer a "credit card," then Credicorp is not purporting to offer a credit card, and is not a loan broker.

Not only does he repeat his mistaken conclusion about Credicorp holding itself out as a loan broker, he, with *no basis in the factual record*, suddenly concludes that Credicorp "makes loans" to its members to purchase merchandise. By definition, Credicorp does not loan anything to its members. Even though the Department admitted that Credicorp did not make loans nor offer to fund loans, for the purpose of further refuting the Hearing Officer's unsupported conclusion, one need only go to Black's Law Dictionary, which defines "loan" as: "Delivery by one party to and receipt by another party of a sum of *money* . . . (or) Anything furnished for temporary use to a person at his request, *on condition that it be returned* . . . ." The several other definitions contained in Black's also do not describe Credicorp's business.

Contrary to the Department's position, what Credicorp does *is* different from what a mortgage lender does. Credicorp does not provide any service which allows its members to purchase from anyone other than Credicorp itself on a retail installment basis. It appears that the Hearing Officer, unable to find that Credicorp was a "loan

broker" under a legitimate analysis of the law, attempted to "stretch" the law beyond its intent. Under the Hearing Officer's interpretation, every non-registered retail installment seller would also be a loan broker in violation of Chapter 687. The Legislature could not have intended such an absurd result. Hence, two separate statutes, one on retail sales and one on loan brokers.

Further, the Department is quite aware of the legislative intent of Chapter 687, which was directed against "boiler room" operations, which frequently operated out of South Florida. These operations literally were charging exorbitant up front sums for loans of money and/or for credit repair that characteristically never materialized. On the other hand, Credicorp's members, according to the only testimony on the subject at the final hearing, regularly order and actually receive merchandise and other benefits from Credicorp. Further, unlike the "boiler room" operations, Credicorp's members can obtain unconditional refunds at any time.

The Department's only witness admitted that Credicorp does not loan anything to its members, and the Department cannot now use the Hearing Officer's skewed analysis to find the contrary.

FOURTEENTH EXCEPTION

Respondents except to paragraph 35, not only because the Hearing Officer has erroneously concluded that Credicorp is a loan broker, but also because he erroneously finds that Credicorp charges an "advance fee." Once again, the Hearing Officer ignores the clear, unambiguous definition in the statute. "Advance fee" as defined in the statute, is a charge collected prior to the *closing of a loan*. Under no view of the facts can it be concluded that Credicorp charges such a fee, primarily because it does not close any loans. The Hearing Officer has again attempted to rewrite the plain language of the statute.

FIFTEENTH EXCEPTION

Respondents except to paragraphs 36 and 37. Without any finding of fact or citation to the record, the Hearing Officer gratuitously concludes that Florida residents have been misled by Credicorp's invitations. The record is devoid of any evidence to prove that anyone has been mislead. Further, again with absolutely no basis in fact, he finds that Credicorp appears to be offering a "commonly accepted, widely useful" credit card. The evidence of record clearly indicates just the opposite. The use of the words "Gold Card" are not necessarily associated with any type of credit card. And again, the Hearing Officer misdirects the reader by using the term "line of credit" when the only evidence of record proves that the statutory definition is not applicable to Credicorp's business.

SIXTEENTH EXCEPTION

Respondents except to the conclusions and the recommended penalty contained in paragraphs 38 and 39 of the Recommended Order. Although it is true that the Department did copy batch sheets containing the names of 640 Florida members, the Department never presented proof that any of those Florida members initially received the type of invitation that the Hearing Officer improperly determined to be deceptive. For that matter, the record is devoid of any evidence that any of the 640 members received *any* solicitation. In that regard, the proof was legally insufficient and it was improper to base the penalty on that ground.

SEVENTEENTH EXCEPTION

Finally, Respondents except to the Recommended penalty *in toto* because, as stated above, had the Hearing Officer properly applied the law to the facts, no violations would have been found. As to Chapter 520, the Department's Complaint, even if proven, asserted only one violation by Credicorp. Therefore, the Hearing Officer's proposed penalty is grossly excessive. Further, as to Chapter 687, not only did the Department fail to prove which members received which solicitation, there was no evidence that any of those members were mislead, dissatisfied or otherwise not pleased with the services they had received from Credicorp. To impose such a penalty in that instance is shocking and would clearly be an abuse of discretion. As to the individuals involved, the Hearing

Officer offered no justification for the fines, and as such, they cannot stand. Finally, as to all of the proposed penalties, it is clear that the Hearing Officer generally abused his discretion, by virtue of the fact that the recommended penalties were approximately eight times greater than that requested by the Department.

WHEREFORE, the Respondents request that the agency head grant the above exceptions and enter a Final Order dismissing the Administrative Complaint.

The Florida Retail Sales Installment Act

520.32. Licenses

(1) A person may not engage in or transact the business of a retail seller engaging in retail installment transactions as defined in this part or operate a branch of such business without a license, except that a license is not required for a retail seller whose retail installment transactions are limited to the honoring of credit cards issued by dealers in oil and petroleum products licensed to do business in this state.

(2) An application for a license under this part must be submitted to the department on such forms as the department may prescribe by rule. If the department determines that an application should be granted, it shall issue the license for a period not to exceed 2 years. A nonrefundable application fee not exceeding $200 shall be set by rule and accompany an initial application for the principal place of business and each branch location of a retail installment seller.

(3) A renewal fee not exceeding $200 shall be set by rule. Biennial licensure periods and procedures for renewal of licenses may also be established by the department by rule. A license that is not renewed at the end of the biennium established by the department shall automatically expire and revert to inactive status. Such inactive license may be reactivated within 6 months after the expiration date upon submission of a completed reactivation form, payment of the application fee, and payment of a reactivation fee equal to the application fee. A

license that is not reactivated within 6 months after becoming inactive may not be reactivated.

(4) Each license must specify the location for which it is issued and must be conspicuously displayed at that location. If a licensee's principal place of business or branch location changes, the licensee shall notify the department and the department shall endorse the change of location without charge. A licensee may not transact business as a retail installment seller except under the name by which it is licensed. A license issued under this part is not transferable or assignable.

(5) The department may deny an initial application for a license under this part if the applicant or any person with power to direct the management or policies of the applicant is the subject of a pending criminal prosecution or governmental enforcement action, in any jurisdiction, until conclusion of such criminal prosecution or enforcement action.

(6) Each seller shall designate and maintain an agent in this state for service of process.

Excerpts from the Florida Loan Broker Act

687.14 Definitions.

As used in this act, unless the context otherwise requires:

(1) "Advance fee" means any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker.

(2) "Borrower" means a person obtaining or desiring to obtain a loan of money, a credit card, or a line of credit.

(3) "Department" means the Department of Banking and Finance.

(4) "Loan broker" means any person, except any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, securities broker-dealer, real estate broker or salesperson, attorney, federal Housing Administration or United States Department of Veterans Affairs approved lender, credit card company, installment loan licensee, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license; and also excepting subsidiaries of licensed or chartered consumer finance companies, banks, or savings and loan associations; who:

(a) For or in expectation of consideration arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit;

(b) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature;

(c) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or

(d) Holds himself out as a loan broker.

(5) "Principal" means any officer, director, partner, joint venturer, branch manager, or other person with similar managerial or supervisory responsibilities for a loan broker.

687.141 Loan brokers; prohibited acts.

No loan broker shall:

(1) Assess or collect an advance fee from a borrower to provide services as a loan broker.

(2) Make or use any false or misleading representations or omit any material fact in the offer or sale of the services of a loan broker or engage, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a loan broker, notwithstanding the absence of reliance by the buyer.

(3) Make or use any false or deceptive representation in its business dealings or to the department or conceal a material fact from the department.

SUPREME COURT OF FLORIDA

Tuesday, December 17, 1996

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA, Appellant,	*	
v.	*	CASE NO. 86,601
CREDICORP, INCORPORATED, etc., et al., Appellees.	*	CONSOLIDATED CASES
CREDICORP, INCORPORATED, etc., et al., Petitioners,	*	District Court of Appeal, 1st District - No. 94-440
v.	*	CASE NO. 86,624
DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA, Respondent.	*	

Appellees/Petitioners' Motion for Rehearing filed in the above causes is hereby denied.

OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Jon S. Wheeler, Clerk

Mr. Paul C. Stadler, Jr.
Mr. William E. Williams
Mr. Rex D. Ware
Ms. Vikki R. Shirley
Mr. Robert A. Fox